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SUPREME COURT, U.S.

No. 81-6861

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

RICHARD LEE WHITLEY, Petitioner;

v.

COMMONWEALTH OF VIRGINIA, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED

I. Whether petitioner was denied due process of law and was subjected to cruel and unusual punishment because his sentence of death rests upon a finding of "an aggravated battery" not involving torture or abuse before death, but which was defined as including any capital murder which "is more culpable than the minimum necessary to accomplish an act of murder."

II. Whether petitioner was denied due process of law and was subjected to cruel and unusual punishment where proof of a murder in the commission of a robbery is an essential element of capital murder and provides the sole basis for petitioner's conviction of capital murder, and where:

A. The state affirmatively shifted to petitioner the burden of proving that his motive for committing the murder was something other than robbery, and where;

B. the state courts refused to apply a well-settled matter of state law requiring the prosecution to disprove beyond a reasonable doubt all reasonable hypotheses of innocence inferable from the facts.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The petitioner, Richard Lee Whitley, respectfully prays for a Writ of Certiorari to the Supreme Court of Virginia to reverse its decision affirming the judgment of the Circuit Court of Fairfax County, Virginia, and denying petitioner's request for a rehearing.

OPINION BELOW

The judgment and commitment order of the trial court affirming the jury verdict of guilty and the sentence of death is unreported, but is set out in the appendix (See, Appendix, pp. 14a - 15a). The opinion of the Supreme Court of Virginia affirming the judgment of the Fairfax County Circuit Court is reported at 286 S.E. 2d 162, ____ Va. ____ (1982) and is appended hereto (App., pp. 4a-13a). The opinion of the Supreme Court of Virginia denying Mr. Whitley's petition for rehearing is unreported, but is set forth in the Appendix (App. p. 3a).

JURISDICTION

The final judgment of conviction in the Circuit Court of Fairfax County, Virginia, was entered on June 12, 1981 in Commonwealth v. Richard Lee Whitley, Criminal No. 32737 (App. pp. 14a-15a). The judgment of the Supreme Court of Virginia affirming petitioner's conviction was entered on January 22, 1982, in Whitley v. Commonwealth, No. 81-1071 (App. pp. 4a-13a). The petition for rehearing was denied by the Supreme Court of Virginia on March 12, 1982 (App., p. 3a). On April 23, 1982, an extension of time

within which to file the instant Petition for Writ of Certiorari was granted upon application to Chief Justice Warren E. Burger, Circuit Justice for the Fourth Circuit (App. p. 1a). Said extension was granted to and including June 10, 1982. This petition is timely filed. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting in this Court deprivation of rights, privileges and immunities secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the law.

Virginia Code §18.2-21(d)(1950), as amended:

> The following offenses shall constitute capital murder, punishable as a Class 1 felony:
>
> * * *
>
> (d) The willfull, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon;
>
> * * *

Virginia Code §19.2-264.2 (1950), as amended:

> Conditions for imposition of death sentence. - In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) ... [find] that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

STATEMENT OF THE CASE

On August 8, 1980, petitioner was arrested in Tampa, Florida on a fugitive warrant charging him with the first degree murder of Mrs. Phoebe C. Parsons in violation of Virginia Code §18.2-32 (App. pp. 23a-24a). Petitioner waived extradition and on August 15, 1980 was returned to Fairfax County, Virginia. After a preliminary hearing in which probable cause was found, a grand jury on November 17, 1980 returned an indictment charging petitioner with capital murder in the commission of a robbery while armed with a deadly weapon in violation of Virginia Code §18.2-31(d) (App. p. 22a). Trial by jury with appointed counsel commenced on May 12, 1981, in the Fairfax County Circuit Court.

At trial, petitioner did not deny that he murdered Mrs. Parsons, but rather argued that his motive for doing so was not robbery (App., pp. 16a-18a). The only direct evidence of petitioner's intent was provided in a written statement petitioner gave following his arrest which was introduced by the Commonwealth in its case-in-chief (Commonwealth's Exhibit #33). The evidence adduced at trial revealed the following facts.

For some time prior to the murder petitioner lived with his wife and daughter next door to the widowed victim. On several occasions, petitioner did odd jobs for the victim for which she had paid petitioner by personal check. On one occasion over a month prior to the murder, petitioner discussed the possibility of purchasing an automobile from one of the victim's daughters. Consequently, petitioner and the victim were well acquainted, petitioner having been in her home on numerous occasions.

On the evening of Friday, July 25, 1980, the victim had dinner until about 8:00 p.m. with her daughter, her son-in-law, and

her grandchild at the victim's home. In his statement, petitioner indicated that sometime thereafter he went to the victim's house to use her telephone to call about his broken down car. His employer agreed to come to petitioner's home within an hour, but when his employer had not arrived after two hours, petitioner returned to the victim's house to call his employer a second time. As petitioner was leaving the house after this unsuccessful telephone call, the victim began talking to him by the front door "about church and his wife and stepdaughter" and "the next thing I know she was dead." Although denying any recollection of removing the victim's clothes, petitioner admitted that he dragged her into the back of the house and that "[s]he didn't have anything on when she went to the back bedroom."

Once in the back of the house, petitioner abused the victim by inserting a collapsible umbrella into her rectum and a normal umbrella into her vagina. In the opinion of the medical examiner, however, "the [victim] had little, if any, heartbeat at the time they were inserted or was dead." After these acts, petitioner ransacked the bedroom piling "clothes and boxes and all sorts of stuff" on top of the victim including such diverse items as a Spanish Bible, a typewriter ribbon he removed from a typewriter in a second bedroom, an address book, an envelope and a chess set, all of which subsequently were found to have petitioner's finger or palm prints on them. Approximately ten minutes after taking the victim from the front of the house into the bedroom, petitioner left the victim's house through the back kitchen door taking the victim's car keys, money, credit cards and wallet - the only things proved to have been taken from the house - from the victim's purse which was hanging on a hook on the wall in the

kitchen near the back door.

After leaving the victim's house, petitioner jumped the fence between their houses, took a shower, changed clothes and then left for Florida in the victim's car. On the way to Florida, petitioner used the victim's credit cards to buy gasoline and after he arrived in Florida he used a credit card to buy several items of merchandise. Petitioner abandoned the car in Okeechobee, Florida, on Sunday, July 27, 1980, and returned to Tampa where he subsequently was arrested.

At approximately 2:00 p.m. on Monday, July 28, 1980, another of the victim's daughters returned to her mother's house after a visit to Williamsburg, Virginia. Upon her arrival, the daughter noticed that her mother's car was not there, which surprised her since her mother was expecting her daughter's arrival. After unlocking the front door with her own key, the daughter tried to open the door, which was apparently blocked from the inside. She squeezed in, looked around and observed "papers all over the floor and ... a lamp that was knocked over. Furniture seemed to be slightly out of place. All sorts of stuff, magazines and papers were on the floor."

The daughter proceeded to the back of the house where she observed a pile of "clothes and boxes and all sorts of stuff" in the first bedroom on the right. In the next bedroom, she "noticed a lot of clothing on the floor and the bureau had been messed up, and ... the bedspread was dragged on the floor part way." An electric fan was still blowing near the bed. She returned to the first bedroom where she observed that in addition to the pile of clothes "[t]here were a few things knocked over. There was an iron on the floor and some things like that that were just out of place."

Not yet comprehending what she was witnessing, the daughter telephoned her sister to see if she knew where their mother was, but her sister did not know. Upon further examination, she "saw a foot or the lower part of a leg from the knee down, kind of sticking up out of the pile of stuff on the floor." She called the police and awaited their arrival.

The first police officer on the scene verified that the victim was dead, and then secured the house until police investigators arrived. The crime scene investigating officer entered the house by the front door and noticed that the house had been ransacked. Immediately inside the front door the officer noticed a large quantity of dried blood and the victim's blood-soaked clothes. Further observation revealed bloody footprints leading from the living room down a hallway toward the bedrooms. In the first bedroom the officer observed a large pile of clothing and other things on the bedroom floor, and a foot protruding from underneath the pile. After removing the clothing, he found the victim laying on her stomach with strangulation marks on her throat, which had been cut.

The officer next observed a bloody palm print, later identified as petitioner's, on the door leading into the bedroom where the victim was found. Petitioner's fingerprints were found on the Spanish Bible, the address book, the envelope and the chess set, all of which were in the pile of things found on top of the victim. Other bloody partial footprints were found in the hallway and a bloody footprint was found in the middle of the victim's back. Finally, the officer found the victim's purse hanging on a hook or nail in the kitchen near the back door. There was no evidence of a forcible entry into the house.

Through a detective from Tampa, Florida, the Commonwealth introduced a Road Atlas and an Exxon gasoline credit card receipt which had been recovered from the victim's car. Each of these items was found to bear petitioner's finger or palm prints.

An autopsy conducted on August 29, 1980, revealed that the victim was nude, but for a gold band with white stones on the fourth finger of the right hand. The medical examiner could not determine whether the victim had been strangled first or whether her throat had been cut first, but in his opinion death was caused either by the "wounds of the left neck [or by] strangulation of ligature." In the medical examiner's opinion, the victim "had little, if any, heartbeat ... or was dead" at the time she was physically abused.

At the conclusion of the Commonwealth's case, the jury was excused temporarily and counsel for petitioner argued a motion to stike the evidence, maintaining that the killing "did not occur during ... the commission of a robbery." Instead of a murder during the commission of a robbery, counsel argued, the theft was "an afterthought as [petitioner] left the back door of the house." Counsel repeatedly asserted that the Commonwealth's evidence proved at most "a larceny that took place after the murder." (App. pp. 16a-18a). After counsel for petitioner had

concluded his argument on the motion, and without hearing from the attorney for the Commonwealth, the trial judge replied, "Thank you [counsel]. The motion to strike is denied ... Viewing all the evidence that has been submitted it is my opinion that [petitioner's] intent and motive is entirely a jury question." (App. p. 19a.)

Thereafter, the jury returned to the courtroom and petitioner called his only witness who testified that petitioner was employed by him as a housepainter in July, 1980, and that petitioner had been paid $112.45 on July 25, 1980, the date of the murder. He introduced the cancelled check which indicated that petitioner had cashed it on the same day. At the conclusion of this testimony, the defense rested. The Commonwealth offered no rebuttal evidence and the jury was excused until the next day. Petitioner did not renew his motion to strike the Commonwealth's evidence.

The following morning the jury was instructed and counsel presented closing arguments. The jury retired to consider its verdict at 11:30 a.m., and returned at 12:45 p.m. with a verdict finding petitioner "guilty of capital murder as charged in the indictment." Thereafter, the jury was polled as to its verdict and each member affirmed the verdict.

After a luncheon recess, the Commonwealth presented a member of the Tampa, Florida, Police Department who testified that he interviewed petitioner on the day of his arrest in Florida. In the statement given to the officer, petitioner was asked where he had cut the victim and petitioner reportedly replied, "I cut her in the juglar vein, they die quicker when you cut them there." The officer also related that petitioner was asked what the victim

was doing when she was killed and that petitioner replied that she was praying for him not to kill her. At the conclusion of the officer's testimony, the Commonwealth rested.

The defense offered the testimony of Dr. Henry Gwaltney who had examined petitioner upon court order prior to trial to determine his competency at the time of the offense and to stand trial. The doctor testified that based on his examinations of petitioner he had concluded that petitioner "was under emotional disturbance due to the disappearance of his wife, and this was reportedly complicated by ... excessive drinking and use of drugs prior to the offense." The doctor further indicated that "the use of alcohol and various kinds of psycho-stimulants, drugs, can decrease and depress inhibitions in an individual and these can faciliate to a greater or lesser extent the externalization, the coming out of aggressive or disruptive impulses." In cross examination, the doctor conceded that in his opinion even if petitioner was under emotional distress "he maintained sufficient capacity to appreciate the criminality of his conduct" and the ability to "conform his conduct to the requirements of the law." The defense then rested.

The jury was instructed, heard arguments of counsel, and retired to consider its verdict at 3:00 p.m. The jury returned with its verdict at 3:30 p.m., stating, "We the jury on the issues joined having found the defendant guilty of capital murder during the willful, deliberate and premeditated killing of Phoebe Parsons in the commission of a robbery while armed with a deadly weapon, and that his conduct in committing the offense [w]as outrageously and wantonly vile, horrible or inhumane in that it involved depravity of mind or aggravated battery of Phoebe Parsons, and having considered the evidence in mitigation of the offense

unanimously fix the punishment at death." The Court referred the case for preparation of a presentence report upon motion of petitioner.

In the June 12, 1981, sentencing hearing neither petitioner nor the Commonwealth made opening remarks or presented any evidence. Counsel for petitioner argued essentially that the killing did not occur during commission of a robbery and that the jury was unable to sort out this technical legal defense. Moreover, counsel pointed out, petitioner had been cooperative since his arrest, and thay any doubt should be resolved in petitioner's favor.

The Court ruled:

> Well, I have sat as judge in both stages of the trial and, of course, in this proceeding here today; and as [counsel] said, I am familiar with all the facts of the case.
>
> I have independently reviewed the jury's verdict, based on the evidence in both phases of the trial. I have independently reviewed the presentence report. I can find no fault, whatsoever, in the jury's verdicts in any of the phases.
>
> I can find nothing to mitigate the crime, and I do find a sentence of death to be appropriate and just.
>
> Mr. Whitley, I sentence you to death by electrocution. The date of your execution shall be March 29, 1982. There will be an automatic appeal.

(App. 20a-21a). No post trial motions were filed on petitioner's behalf.

On direct appeal to the Supreme Court of Virginia, petitioner argued, inter alia, that "[t]he Commonwealth failed to prove beyond a reasonable doubt that an intent to steal preceded the murder, in violation of [petitioner's] state and federal constitutional due process rights." Brief for Appellant, pp. 22-33.

Petitioner also argued that "[t]he Virginia capital murder statute is unconstitutional as applied to [petitioner], and denies him due process of law and a fair trial, and subjects him to cruel and unusual punishment" because petitioner's "state of mind in committing the murder ... did not 'reflect[] a consciousness materially more depraved than that of any person guilty of murder.'" Brief for Appellant, pp. 47-49 (quoting from Godfrey v. Georgia, 446 U.S. 420 (1980)). This resulted, petitioner argued, because the Virginia Supreme Court steadfastly has refused to give Virginia Code §19.2-264.2 a constitutionally narrow construction as required by this Court.

On January 22, 1982, the Virginia Supreme Court affirmed the conviction holding, inter alia, that "[w]e are of [the] opinion that the evidence was fully sufficient to support the conclusion that [petitioner] murdered Mrs. Parsons with intent to rob her of her automobile." Whitley, 286 S.E.2d, at 167 (App., p. 9a). On the question of whether the Commonwealth has proved an aggravated battery under Godfrey v. Georgia, the court held that "[w]e are of [the] opinion that the jury properly could have found that [petitioner's] serial assaults upon Mrs. Parsons constituted in aggravated battery within the intendment of the statutory vileness standard, and we reject his constitutional complaint." Whitley, 286 S.E.2d, at 170 (App., p. 12a).

Subsequently, petitioner filed a petition for rehearing in the Virginia Supreme Court in which he argued, inter alia, that the court "failed to fulfill its obligation on review and ... shifted to [petitioner] burdens of proof properly borne by the Commonwealth, [thereby] denying [petitioner] due process and equal protection of the law, and subjecting him to cruel and unusual punishment in violation of the Eighth and Fourteenth

Amendments to the United States Constitution." Petition for Rehearing, pp. 2-7. On March 12, 1982 the court denied the petition with the statement that "[f]inding no merit in the other grounds assigned by [petitioner], the [c]ourt is of [the] opinion that the petition to rehear ... should be, and the same hereby [is], denied." (App., p. 3a.)

REASONS FOR ALLOWANCE OF THE WRIT

I. Introduction.

This case requires the Court once again to determine whether a sentence of death was imposed in a rational way, or whether it was imposed in a manner permitting of arbitrary and discriminatory application of the ultimate sanction of death. It calls into question the state's definition of an "aggravated battery" as any capital murder which "is more culpable than the minimum necessary to accomplish an act of murder," yet which in this case involves no torture or serious physical abuse prior to death. It sets before the Court for resolution a dispute among the highest courts of several states over the proper definition of "aggravated battery," and whether Godfrey v. Georgia, 446 U.S. 420 (1980) requires that term to include evidence of torture or serious physical abuse of the victim before death.

Additionally, this case requires the Court to compel the state to take seriously its obligation to review capital murder cases in a meaningful way. In particular, it calls upon the Court to correct the unwarranted and unconstitutional shifting of the burden of proof which the state court has undertaken in order to affirm petitioner's conviction and death sentence. It puts before the Court the state court's refusal to adhere to the requirements of In re Winship, 397 U.S. 358 (1970) and Mullaney

v. Wilbur, 421 U.S. 684 (1974). Finally, and most importantly, it requires the action of this Court to prevent the tragic and illegal execution of petitioner, Richard Lee Whitley.

II. Petitioner was denied due process of law and was subjected to cruel and unusual punishment because his sentence of death rests upon a finding of "an aggravated battery" not involving torture or abuse before death, but which was defined as including any capital murder which "is more culpable than the minimum necessary to accomplish an act of murder."

In Gregg v. Georgia, 428 U.S. 153 (1976), this Court held that the Georgia aggravated circumstance provision of its death penalty statute, Ga. Code Ann. §27-2534.1(b)(7). which is identical to the Virginia statute at issue, Va. Code §19.2-264.2[1/], was not unconstitutional on its face based upon the presumption that the statutory language would be narrowly construed by the Georgia Supreme Court. As the Court noted:

> It is of course arguable that any murder involves depravity of mind or an aggravated battery. But the language need not be construed this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction.

Id., at 201.

The presumption that the Georgia Supreme Court would narrowly construe §(b)(7) was challenged in Godfrey v. Georgia, 446 U.S. 420 (1980). In that case a plurality of this Court held that whereas the Georgia court had previously applied §(b)(7) in a

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1/ The relevant statutory language in §19.2-264.2 is identical to that in Georgia Code Annotated §27-2534.1(b)(7) which was construed in Godfrey.

> That the defendant's conduct committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or an aggravated battery.

constitutionally acceptable manner, "[t]he Georgia Courts did not ... so limit §(b)(7) in the present case." Id., at 428. This conclusion was reached after a careful analysis of prior Georgia cases in which §(b)(7) had been applied in a constitutional way, and which identified three essential criteria to limit the language of §(b)(7).

> The first was that the evidence that the offense was "outrageously or wantonly vile, horrible or inhuman" had to demonstrate "torture, depravity of mind, or an aggravated battery to the victim." The second was that the phrase, "depravity of mind," comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim. The third ... was that the word, "torture," must be construed in pari materia with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death.

Id., at 431 (citations and footnotes omitted). It is clear from this analysis that an essential element of the Godfrey decision was the belief that an aggravated battery requires evidence of serious physical abuse prior to death.

Petitioner argued in the Virginia Supreme Court that because the Virginia aggravated circumstance provision is identical to that construed in Godfrey, the Virginia court was required to similarly construe its statutory provision to require proof of serious abuse before death. The court flatly rejected petitioner's argument, arguing instead that Godfrey merely noted Blake v. State, 239 Ga. 292, 236 S.E.2d 637 (1977) in passing, and that the narrowing construction derived from Blake "was not the ratione decidendi in Godfrey." Whitley, 286 S.E.2d, at 169 (App. p. 11a). The court concluded that "[t]he Supreme Court [in Godfrey] was not required to decide, and did not decide, whether an aggravated battery must precede the victim's death in order to satisfy the vileness standard." Whitley, 286 S.E.2d, at 169 (App., p.11a).

Therefore, since the Virginia Supreme Court already had construed an aggravated battery "to mean 'a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder,' Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), cert. denied, 441 U.S. 967 (1979)," the court concluded that it was not required to construe §19.2-264.2 to require proof of physical abuse prior to death. Whitley, 286 S.E.2d, at 170 (App., p. 12a).

Although the Virginia court might legitimately argue that it is not bound by the precise narrowing language of Blake and Godfrey, it cannot simply ignore the constitutional obligation imposed by Gregg to provide a narrowing construction of §19.2-264.2 requiring abuse prior to death. Indeed, by giving its definition in Smith the court has only reluctantly acknowledged any constitutional obligation whatsoever. However, the question remains whether the court has fulfilled its obligation by the construction of §19.2-264.2 adopted in Smith and applied in Whitley.

Petitioner asserts that the definition of aggravated battery adopted in Virginia is itself so vague and overbroad that it does nothing to impose any restraint on the arbitrary and capricious imposition of the death penalty. Clearly, a person of ordinary intelligence and sensibilities could characterize almost any murder as involving more than "the minimum necessary to accomplish an act of murder." For instance, in Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980) the court found that because the accused shot his victim a second and fatal time as the accused was leaving the scene of the robbery, he had committed an aggravated battery under the Smith standard even though

the second shot, rather than being more than was minimally necessary to commit the murder, was the bare minimum needed to accomplish the murder at issue.

In other words, in deciding whether the killing under consideration "is more culpable than the minimum necessary to accomplish an act of murder," in Virginia the trier of fact is free to ignore the facts of the case under consideration and speculate whether under other circumstances and with a different victim and perhaps a more powerful weapon the murder could have been accomplished in a more expeditious manner. If the victim does not die when the first shot is fired or the first blow is struck, then under the Turner decision any subsequent shot or blow converts the murder from one not worthy of imposition of the death penalty to one in which the death penalty is appropriate even though the second blow or shot was in fact necessary to commit the murder at hand. Such unbridled sentencing discretion is just the sort of discretion Gregg presumed the state courts would eliminate so as to make the aggravated battery language constitutionally acceptable.

The overbreath and vagueness of the Smith construction of §19.2-264.2 is highlighted through its application to the facts of this case. The Supreme Court of Virginia, rejecting petitioner's argument that there must be evidence of serious physical abuse before death, applied its own definition of an aggravated battery and concluded:

> [a]ccording to [petitioner's] own account, he first choked his defenseless victim with his bare hands; next, he acquired a rope and strangled her; and then, taking his knife from his pocket, he cut her throat. Each of [petitioner's] several acts was deliberate, each was brutal and potentially fatal, and, together, all were more than the minimum necessary to accomplish the murder.

Whitley, 286 S.E.2d, at 170 (App. p. 12a).

Although the court's recitation of the facts arguably is accurate, the evidence is uncontradicted that petitioner did not torture his victim before death[2/], but rather murdered her as expeditiously as he could with what he had at hand. There was no evidence to suggest that any of the acts occurred separately in time, or that petitioner's purpose or result was to draw out or prolong the act, or to cause additional pain and suffering by the victim. In fact, in the sentencing phase of the trial the state offered the testimony of a police officer from Florida who stated that when asked where he had cut the victim, petitioner replied that he "cut her in the juglar vein [because] they die quicker when you cut them there."

Yet the clear implication of the court's ruling is that because petitioner had to resort to more than a single implement to accomplish the act of murder, somehow his actions were more culpable than if he were a more efficient murderer who had come prepared to accomplish the act with a single lethal weapon. Clearly, permitting the trier of fact to decide what is minimally necessary to accomplish the act of murder is not what the Gregg Court had in mind when it upheld the constitutionality of the aggravated circumstance provision under the assumption the state courts would narrow its facial applicability.

Petitioner's interpretation of Godfrey as requiring proof of serious physical abuse before death is supported by the decisions of the high courts of several other states with similar

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2/ At trial the state conceded that the victim was not tortured. In fact, the prosecutor argued and the court instructed the jury that the murder of Mrs. Parsons involved only a consideration of depravity of mind or aggravated battery, omitting the word "torture" from the instruction based on §19.2-264.2.

statutory provisions. For instance, in State v. Pritchett, 621 S.W.2d 127 (1981) the Tennessee Supreme Court held that despite the lack of the term "aggravated battery" in its capital murder statute, a constitutional construction required evidence of torture before death. Id., at 139. Similarly, the Supreme Court of Delaware relying on Godfrey struck down the aggravated circumstance provision of its capital murder statute which required only that the murder be "outrageously or wantonly vile, horrible or inhuman." Petition of State for Writ, 433 A.2d 325 (1981). See also, State v. Chaplin, 443 A.2d 327 (Del. 1981). Likewise, the Louisiana Supreme Court held that the Godfrey requirement of evidence of abuse before death applied to its aggravated circumstance provision despite language which was significantly dissimilar to the Georgia statute. State v. Sonnier, 402 So.2d 650 (1981). Although the Louisiana court previously had construed its statute, which required that the murder be committed in an "especially heinous, atrocious or cruel manner," to require proof that there was "torture or pitiless infliction of unnecessary pain on the victim," following Godfrey the court held that:

> This construction should be clarified to include an explanation that "torture" requires evidence of serious physical abuse of the victim before death.

Sonnier, 402 So.2d, at 659.

In the instant case, the Supreme Court of Virginia did not reach the issue because of its refusal to recognize the constitutional import of Godfrey. Instead, the court merely concluded that under its amorphous definition of an aggravated battery, without consideration of whether any physical abuses preceded death, the murder of Mrs. Parsons involved "more than the minimum necessary to accomplish the murder." Whitley, 286 S.E.2d, at 170

(App., p. 12a). Rather than permitting the state to continue to avoid its constitutional obligation to provide a sufficiently narrow construction of Virginia Code §19.2-264.2, this Court must take the initiative to resolve the conflict existing among the states over the proper definition of the aggravating circumstance under consideration in the instant case and in Gregg and Godfrey. Until the Court does so, Virginia will continue to give its fact-finders the unbridled discretion to impose the death penalty whenever they conclude than an accused has used a method of murder which involves "more than the minimum necessary to accomplish an act of murder." Smith, 219 Va., at 478.

III. Petitioner was denied due process of law and was subjected to cruel and unusual punishment where proof of a murder in the commission of robbery is an essential element of capital murder and provides the sole basis for petitioner's conviction of capital murder, and where:

A. the state affirmatively shifted to petitioner the burden of presenting evidence to prove at trial and on appeal that his motive for committing the murder was something other than robbery.

In the case of In re Winship, 397 U.S. 358, 364 (1970), this Court unequivocally declared that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In Mullaney v. Wilbur, 421 U.S. 684 (1975), and in Patterson v. New York, 432 U.S. 197 (1977), the Court extended the holding of Winship to prohibit the state from shifting to the accused the burden of persuasion as to any element of the offense with which he is charged. Thus, once a state has established and defined an offense, the prosecution is bound by principles of due process to prove each element of the offense beyond a reasonable doubt.

In the context of this case, the applicable statute defines

capital murder as "[t]he willful, deliberate and premeditated killing of any person in the commission of a robbery while armed with a deadly weapon." Virginia Code §18.2-31(d), as amended. Because the state legislature made imposition of the death penalty depend upon proof that the killing occurred "in the commission of a robbery," Patterson and Mullaney place squarely on the prosecution the burden of proving that element of the offense beyond a reasonable doubt.

The burden of proving that the accused was motivated by robbery remains with the prosecution throughout and any attempt to shift to the accused the burden of proving that his motive was something other than robbery violates the proscription of Patterson and Mullaney, and denies the accused due process of law. This burden of proof is neither increased nor decreased by any effort on the part of the accused to discredit robbery as the motive for his crime. The accused is not obligated to explain his actions, and any evidence offered by the accused by way of a defense does not alter the fact that the burden of proof rests with the prosecution. Commonwealth of Pennsylvania v. Rose, 321 A.2d 880 (1974). See also, Patterson and Mullaney.

Moreover, since the burden upon the prosecution of proving guilt beyond a reasonable doubt extends to appellate review of questions involving sufficiency of the evidence, Jackson v. Virginia, 443 U.S. 307 (1979), a convicted person is entitled to relief on appeal if he can establish that no rational trier of fact could have found guilt beyond a reasonable doubt. Id., at 324. He is not required to prove his innocence or to disprove his guilt. Consequently, a standard of appellate review which requires a convicted person to do just that violates the principle of proof beyond a reasonable doubt and denies the accused due

process of law.

In this case, petitioner argued at trial and on appeal to the Supreme Court of Virginia that the evidence presented by the prosecution was insufficient to prove beyond a reasonable doubt that he was motivated by robbery. (App. pp. 8a-9a, 16a-18a). Instead, petitioner argued that the evidence taken in the light most favorable to the prosecution "lead[s] unmistakably to the conclusion that he killed the victim in a berserk passionate rage and stole her property only as an after-thought. At the very least [petitioner] contends that the foregoing conclusion is equally likely under the facts as is the Commonwealth's theory that he killed during a robbery, and that the Commonwealth failed to disprove the former theory beyond a reasonable doubt." Brief of Appellant, pp. 27-28.

In rejecting this argument, the Supreme Court of Virginia concluded that "the fact that the larceny did not occur until after [petitioner] killed his victim does not prove that his decision to steal was an after-thought" (App., p. 8a)(emphasis added). As support for its conclusion that petitioner failed to "prove" his motive, the court also noted that at trial petitioner failed to ask one of his witnesses to verify petitioner's version of events (App. p. 8a), even though the prosecution had an equal opportunity to prove its case and to disprove petitioner's version of the events through its cross-examination of the same witness. Thus, the state supreme court has itself shifted to petitioner the burden of proof as to an essential element of the offense with which he is charged in direct contravention of this Court's holdings in Patterson, Mullaney and Jackson. By so doing, petitioner has been denied due process of law by the state supreme court.

That the unconstitutional shifting of the burden of proof was committed by the state supreme court rather than the trial

court or the state legislature does not alter or lessen the deprivation of federally protected due process rights.[3/] As the Court noted in Brinkerhoff:

> If the result above were attained by an exercise of the State's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid state statute. The federal guarantee of due process extends to state action through its judiciary as well as through its legislative, executive or administrative branch of government.

281 U.S. at 679-80 (citations and footnotes omitted).

In the instant case, the state supreme court required petitioner to prove both at trial and on appeal that his motive for killing the victim was other than robbery. The prosecution thereby was relieved of its burden of proving at trial every element of the offense of capital murder beyond a reasonable doubt in violation of Patterson, Mullaney and Winship. Moreover, petitioner was denied appellate relief because he did not disprove his guilt, in violation of Jackson and Winship. In each instance petitioner was denied his liberty and indeed his life without due process of law. In light of the critical importance of appellate review to avoid the arbitrary imposition of the

---

3/ Petitioner timely filed a petition for rehearing in the state Supreme Court in which he asserted that the court "failed to fulfill its obligation on review and ... shifted to [petitioner] burdens of proof properly borne by the Commonwealth, [thereby] denying [petitioner] due process and equal protection of the law and subjecting him to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Reply Brief, p. 5. Expressly "[f]inding no merit" in this assertion, the court denied the petition for rehearing (App. p. 3a). The issue having thus been raised and considered by the state court at the first opportunity to do so, it is ripe for consideration by this Court. Brinkerhoff-Faris Co. v. Hall, 281 U.S. 673, 677-78 (1930).

death penalty, see Godfrey v. Georgia, 446 U.S. 420 (1980), petitioner prays that the Court allow the writ of certiorari to settle the question in conformity with the rule of In re Winship as construed and applied in Mullaney, Patterson and Jackson.

B. The state courts refused to apply a well-settled matter of state law requiring the prosecution to disprove beyond a reasonable doubt all reasonable hypotheses of innocence inferable from the facts.

In order to convict petitioner of capital murder the prosecution was required to prove beyond a reasonable doubt that in murdering his victim petitioner was motivated by robbery. Whitley, 286 S.E.2d at 166 (App., p. 8a). Under Virginia law, the prosecution also was required to disprove beyond a reasonable doubt "every reasonable hypothesis other than that the accused [was] guilty." Wright v. Commonwealth, 196 Va. 132, 137, 82 S.E.2d 603, 606 (1954). This standard includes the requirement that "where a fact is equally susceptible of two interpretations, one of which is consistent with the innocence of the accused, [the trier of fact] cannot arbitrarily adopt that interpretation which incriminates him." Burton and Conquest v. Commonwealth, 108 Va. 892, 899, 62 S.E. 376, 379 (1908).

If at trial or on appeal an accused can point to a single reasonable hypothesis of the facts which is consistent with his innocence, the jury must acquit him and the appellate court must reverse the conviction if the jury has failed to acquit, even though the facts also may be consistent with guilt. See, Christian v. Commonwealth, ____ Va. ____, 277 S.E.2d 205 (1981). See also, Wright, 196 Va., at 137; Burton and Conquest, 108 Va., at 899. The state courts cannot satisfy this obligation merely by culling the record for one or more theories of the facts

which are logically consistent with guilt. Instead, the courts are obligated to carefully review the record to ascertain whether there exists a single reasonable explanation of the facts which is consistent with the innocence of the accused, and if such a reasonable hypothesis of innocence exists, take the case from the jury or reverse any conviction obtained in disregard of that standard. Christian v. Commonwealth, 277 S.E.2d at 208.

Although this Court held in Holland v. United States, 348 U.S. 121 (1954) that proof of guilt to the exclusion of every reasonable hypothesis of innocence is not constitutionally required, it is clear that such proof is required in Virginia as a matter of state law. Consequently, because the prosecution in Virginia is required to shoulder that burden, due process requires that the state rationally apply its standard to the facts in evidence. See, Jackson v. Virginia, 443 U.S., at 317. As the Court stated in another context:

> We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government.

Wolff v. McDonnell, 418 U.S. 539, 558 (1974)(citation omitted). Likewise, in Vitek v. Jones, 445 U.S. 480 , 100 S.Ct. 1254 (1980) the Court noted that

> Once a State has granted ... a liberty interest, ... due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'

Id., at 1261 (quoting Wolff, 418 U.S., at 557).

In spite of its state-created obligation, the Supreme Court of Virginia affirmed petitioner's conviction stating that either "the jury logically could have concluded that both sex and robbery motivated his conduct," Whitley, 286 S.E.2d, at 166 (App. p. 8a),

or that "the jury could have concluded the [petitioner] needed the use of a car; that his purpose in going to his neighbor's home was to steal or borrow one; that his neighbor refused to give him the keys and turned the conversation to talk about his wife and 'going to church and everything,' and that [petitioner], frustrated, humiliated, and enraged, decided at that moment to kill her, ransack the house for the keys, and steal her car." Whitley, 286 S.E.2d, at 166-67 (App. pp. 8a-9a). In other words, the court concluded that petitioner's motive could have been "both sex and robbery," or robbery alone.

As an initial matter, the fact that these two versions may be reasonable, as the court concluded, does not preclude as a reasonable possibility that petitioner was motivated by sex alone. Consequently, under the state court's own reasoning, a reasonable hypothesis of the facts exists which is consistent with petitioner's innocence. For that reason, petitioner was denied due process of law when the state court arbitrarily rejected that hypothesis of innocence in favor of an interpretation of the facts which incriminated petitioner. In other words, the state court denied petitioner due process of law by failing to apply its own standard in a rational way, and by affirming petitioner's conviction in spite of the existence of a reasonable hypothesis of innocence.

The court's opinion merely articulates two possible theories of the facts which arguably are consistent with petitioner's guilt, while failing to point to any facts inconsistent with the reasonable possibility that petitioner killed and abused his victim in a sexual rage and stole her car because "[o]n the night of the crime [petitioner's] car was 'broken down' [and h]is next

door neighbor owned a car [which petitioner] stole" to make his escape. Whitley, 286 S.E.2d, at 166 (App. p. 8a). Without disproving that reasonable possibility beyond a reasonable doubt, the state has not sustained its burden of excluding "every reasonable hypothesis except that of guilt." See, Cameron v. Commonwealth, 211 Va. 108, 109, 175 S.E.2d 275, 276 (1970).

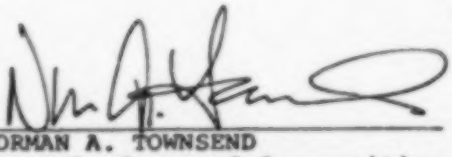
As a consequence, the state has disregarded its federal due process obligation to apply its own standard in a rational non-discriminatory manner. This obligation is heightened in the instant case because the death penaly was imposed based solely upon the finding, not adequately substantiated by the record, that petitioner was motivated to kill his victim by the desire to steal her car. In this way too, petitioner was denied his liberty and his life without due process of law. Consequently, petitioner prays that the writ be allowed to correct the decisions of the state courts which do not conform to the federal requirement of due process of law.

CONCLUSION

For these reasons, and in the interest of justice and due process of law, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Virginia affirming the conviction and sentence of death imposed upon petitioner by the Circuit Court of Fairfax County, Virginia.

Respectfully submitted,

RICHARD LEE WHITLEY
By Counsel



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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

RICHARD LEE WHITLEY, Petitioner;

v.

COMMONWEALTH OF VIRGINIA, Respondent.

APPENDIX

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Supreme Court of the United States

No. A-886

Richard Lee Whitley,

Petitioner,

v.

Virginia

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(x),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 10, 1982.

/s/ Warren E. Burger
Chief Justice of the United States.

Dated this 23rd
day of April, 19 82.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 23rd *day of* March, 1982.

Richard Lee Whitley, Appellant,

against Record No. 811071
Circuit Court No. C-32737

Commonwealth of Virginia, Appellee.

ORDER STAYING EXECUTION OF JUDGMENT

Upon consideration of the application of the appellant, by counsel, praying for a stay of execution of the judgments rendered herein on January 22 and March 12, 1982, in order that he may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgments of this court, it is now ordered that the execution and enforcement of the judgments of this court in the above-styled case rendered on January 22 and March 12, 1982, be, and the same are hereby, stayed, to and including the 10th day of June, 1982, on the expiration of which time the same may be enforced, unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

A Copy,

Teste:

Allen L. Lucas
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 12th *day of* March, 1982.

Richard Lee Whitley, Appellant,

against, Record No. 811071
Circuit Court No. C-32737

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

Came appellant, by counsel, and petitioned this Court to set aside its judgment rendered herein on January 22, 1982, and to grant a rehearing in this appeal, the petition alleging, inter alia, that the Court based its review of his sentence under Code § 17-110.1(C)(2) "on substantive materials not generally available to those accused of capital murder". The appellant further petitioned this Court to stay execution of the death sentence in this case pending a decision on his petition to rehear.

Because all petitions for appeal, briefs in opposition to appeal, and printed records and briefs on appeal which are filed in the office of the Clerk of this Court and utilized by this Court in its review of capital sentences are matters of public record available for inspection upon request directed to the Clerk, we find no foundation for the allegation.

Finding no merit in the other grounds assigned by appellant, the Court is of opinion that the petition to rehear and the petition for stay of execution should be, and the same hereby are, denied.

A Copy,

Teste:

Allen L. Lucas
Clerk

collect this fee because of your kind agreement to disburse the funds in accordance with the assignment." At trial, Lataif mentioned the possibility of a second assignment, a lawsuit, garnishment, and attachment. On appeal, the defendants suggest that any such action would have been fruitless and that, in such case, estoppel would fail for want of detriment.

It is a fact that Myers filed a petition in bankruptcy in December 1978. But this was some five months after Cobb first assured Lataif that the assignment would be honored, and there is nothing of record to show that Myers was judgment-proof during the time Lataif was relying on Cobb's assurance. Moreover, the trial court's ruling was not based upon want of detriment, and that question is not before us on this appeal.

The inaction into which Lataif said he was lulled by Cobb's representation constituted a change in his position, and we hold that Lataif's evidence made out a *prima facie* case of estoppel against Cobb and that the trial court erred in sustaining his motion to strike.[3]

The judgment will be reversed, Lataif's cause of action restored to the docket, and the case remanded for further proceedings consistent with this opinion.

Reversed and remanded.

3. The defendants argue that "[w]hat Lataif wants is to hold CICI or Cobb, individually, liable to him for Myers' debt" and that Cobb's oral assurance that the assignment would be honored is unenforceable under the Statute of Frauds because, they say, it was no more than "a promise to answer for the debt ... of another." Code § 11-2(4). We disagree. As we have said, a promise is not a condition precedent to the duty of an obligor to pay an assignee; the duty arises by operation of the law of assignments. Hence, considering the evidence adduced at trial, we hold that it is immaterial whether Cobb's assurance was written or oral.

Richard Lee WHITLEY

v.

COMMONWEALTH of Virginia.

Record No. 811071.

Supreme Court of Virginia.

Jan. 22, 1982.

Defendant was convicted in the Circuit Court, Fairfax County, F. Bruce Bach, J., of capital murder in commission of armed robbery and was sentenced to death. His appeal from the conviction was consolidated with his statutory right of sentence review. The Supreme Court, Poff, J., held that: (1) evidence was sufficient to sustain conclusion that killing was premeditated; (2) evidence was sufficient to support conclusion that defendant murdered victim with intent to rob her of her automobile; (3) prejudicial effect of black and white photographs showing victim's body in gruesome condition in which it was found three days after death did not outweigh its probative value; (4) death penalty statute was not unconstitutional on its face or as applied to defendant; and (5) imposition of death penalty was not excessive or disproportionate to penalty imposed in similar cases.

Affirmed.

1. Homicide ⇐14(2)

While intent to kill must be product of premeditation, in determination of premeditation vel non, interval between formation of intent and killing itself is not controlling consideration.

2. Homicide ⇐222

In prosecution for capital murder, evidence that defendant choked victim with his hands, obtained rope and strangled vic-

tim, and then took knife from his pocket and cut her throat supported jury's conclusion that intent to kill was product of premeditation. Code 1950, § 18.2-31.

3. Robbery ⇐1

Robbery, defined at common law as taking, with intent to steal, of personal property of another from his person or in his presence, against his will, by violence or intimidation, is crime against person of victim rather than crime against property.

4. Homicide ⇐18(5)

While violence or intimidation must precede or be concomitant with taking, it is immaterial for purposes of offense of capital murder in commission of robbery that victim is dead when theft occurs. Code 1950, § 18.2-31(d).

5. Robbery ⇐9

For purposes of common-law definition of robbery, corpse is "person" if taking occurs minutes after victim is killed.

See publication Words and Phrases for other judicial constructions and definitions.

6. Criminal Law ⇐568

Criminal intent, a state of mind, may be, and often must be, shown by circumstantial evidence.

7. Homicide ⇐235

In prosecution for capital murder in commission of armed robbery, evidence that defendant's car was broken down on night of crime and that defendant stole victim's car after killing her supported conclusion of jury that defendant killed victim with intent to rob her of her automobile, even though jury could have found that killing was act of sexual psychopath from defendant's extrajudicial statements and physical evidence and that larceny was committed only as afterthought; fact that larceny did not occur until after killing did not prove that defendant's decision to steal was afterthought. Code 1950, § 18.2-31(d).

8. Criminal Law ⇐438(7)

In prosecution for capital murder in commission of armed robbery, prejudicial effect of black and white photograph showing victim's body in gruesome condition in which it was found by investigating officers three days after death did not outweigh its probative value since photograph was relevant and material to establish premeditation and to show degree of atrociousness of crime. Code 1950, § 18.2-31(d).

9. Criminal Law ⇐706(5)

In prosecution for capital murder in commission of armed robbery, prosecutor's questioning investigating officer whether defendant explained why his wife and daughter had left him was not improper on theory that questions were intended to imply sexual improprieties involving defendant and his daughter where implication of sexual improprieties was speculative and where defendant did not object to question on ground that it was evidence of prior bad acts or move for mistrial or seek curative instruction.

10. Criminal Law ⇐1037.1(2), 1044.2(1)

In prosecution for capital murder in commission of armed robbery, Supreme Court would not consider merits of defendant's objections to comments in prosecutor's closing argument in which prosecutor allegedly misstated Commonwealth's burden of proof and commented on defendant's failure to testify where defendant voiced no objection to either statement either at time they were made or in post-conviction motions.

11. Constitutional Law ⇐270(1)
Criminal Law ⇐1208(2), 1213

Criminal statute which affords sentencing judge or jury unbridled choice between death penalty and lesser sentence violates Eighth and Fourteenth Amendments, but sentencing discretion is constitutionally permissible if it is suitably directed and limited so as to minimize risk of wholly arbitrary and capricious action. U.S.C.A.Const. Amends. 8, 14.

12. Criminal Law ⇐1206(2)

Legislative judgments on definition and gradation of offenses are constitutionally sufficient unless courts can say that severity of penalty prescribed is not ration-

ally related to gravity of offense. U.S.C.A. Const.Amends. 8, 14.

13. Homicide ⇐351

Capital murder statute was not unconstitutional where legislative gradation of homicide offenses was rationally related to penalties prescribed for each grade. Code 1950, §§ 18.2-31, 19.2-264.2; U.S.C.A. Const.Amends. 8, 14.

14. Homicide ⇐354

Imposition of death penalty upon defendant convicted of capital murder in commission of armed robbery under statutory vileness standard was not unconstitutional where evidence that defendant choked his defenseless victim, strangled her, and then cut her throat with a knife and that each act was deliberate, brutal and potentially fatal and together were more than minimum necessary to accomplish murder was sufficient from which jury could conclude that defendant's assault upon victim constituted aggravated battery within meaning of the vileness standard. Code 1950, § 19.2-264.2.

15. Homicide ⇐354

In prosecution for capital murder in commission of armed robbery, trial court did not err in confirming jury's death verdict even though probation officer's report indicated that defendant had been accused of three forcible sexual offenses and thereby supported defendant's theory that sex rather than robbery was motive for killing where probation report also contained long list of charges and convictions of automobile larceny, burglary, breaking and entering, and other crimes, reinforcing jury's finding that killing occurred in commission of armed robbery. Code 1950, § 19.2-264.5.

16. Criminal Law ⇐1206(2)
Homicide ⇐354

Imposition of death penalty upon defendant convicted of capital murder in commission of robbery was not excessive or disproportionate to penalty imposed in similar cases. Code 1950, §§ 17-110.1, subd. C, 18.2-31(d), 19.2-264.4, subd. B.

Warren W. McLain, Norman A. Townsend, Arlington (Kendrick, Gearheart, Aylor & Lockwandt, Arlington, Graber, Stetler & Townsend, Alexandria, on briefs), for appellant.

Richard B. Smith, Asst. Atty. Gen. (Marshall Coleman, Atty. Gen., on brief), for appellee.

Before CARRICO, C. J., COCHRAN, POFF, COMPTON, THOMPSON and STEPHENSON, JJ., and HARRISON, Retired Justice.

POFF, Justice.

In a bifurcated trial of an indictment under Code § 18.2-31(d), a jury convicted Richard C. Whitley of capital murder in the commission of robbery while armed with a deadly weapon and fixed his punishment at death. The trial court confirmed the conviction, considered the probation report, and imposed the sentence fixed by the jury. We have consolidated Whitley's statutory right of sentence review with his appeal from the conviction and accorded the case priority on our docket.

The evidence leaves no doubt that Whitley killed Phebe Parsons, his next-door neighbor. The 63 year-old widow lived alone, and the crime, committed the night of July 25, 1980, a Friday, was not discovered until the following Monday. The investigating officers found a mass of dried blood on the floor inside the front door and a trail of blood leading to Mrs. Parsons' nude body which was lying beneath a pile of clothes and other articles on the floor beside her bed. Her blood-soaked clothing and a link from a watchband (later identified as Whitley's) lay on the floor near the front door. The home was in disarray and the victim's wallet was missing from her purse which was hanging on a hook near the back door.

An autopsy revealed a neck laceration 4½" long, gaping to 2", a ligature mark on the neck, a ½" cut on the forehead, and several abrasions and contusions on the upper back and right elbow. An umbrella of conventional design had been inserted into the

vaginal cavity, puncturing the vaginal wall and bruising the small intestine. A collapsible umbrella had been forced into the rectal cavity, piercing the wall and damaging a major artery. The medical examiner testified that there was "very little evidence of hemorrhage" in either cavity, a circumstance which indicated that "the individual had little, if any, heartbeat at the time they were inserted or was dead." In his opinion, death was caused by the neck wound or strangulation.

According to several statements Whitley made to the police, all of which were admitted into evidence, Whitley had gone to Mrs. Parsons' home early in the evening of July 25 to use her telephone. He called his employer, Garry Monohan, who agreed to come to Whitley's home to repair his "broken down" car. When two hours had passed and Monohan had not arrived, the defendant returned to Mrs. Parsons' home and made a second call. As he approached the front door to leave, Mrs. Parsons stopped him and "we were talking about my wife and going to church and everything and the next thing I know she was dead." Whitley explained to the officers that "there had been some trouble" with his wife's 10 year-old daughter by a previous marriage and that both had left him.

Whitley admitted that he had choked Mrs. Parsons with his hands, strangled her with a rope, and cut her jugular vein with a Boy Scout pocketknife as she prayed for her life. He lifted her from the floor near the front door, dragged her to the bedroom, and attempted, without success, to place her on the bed. He did not remember removing her clothes or inserting the umbrellas in her body, and he denied that he had engaged in any sexual conduct. Abandoning his effort to get her body on the bed, he "ransacked" the house, "looking for a gun." Finding none, he took Mrs. Parsons' car keys and credit cards from her purse, replaced the purse on its hook, left by the back door, and fled in Mrs. Parsons' car. Arrested in Florida, Whitley confessed his guilt and waived extradition.

Mrs. Parsons' daughter testified that, during the month before the murder, Whitley had indicated an interest in buying a car she owned. Called as a defense witness, Whitley's employer testified that he had paid Whitley his wages, $112.45, on the day of the crime. Monohan was never asked to verify Whitley's statement that he had telephoned him that night.

Addressing the conduct of the guilt phase of his trial, Whitley assigns multiple evidentiary and constitutional errors and asks us to reverse his conviction. In the alternative, he prays that we commute his sentence of death to imprisonment for life.

I. THE GUILT TRIAL

A. *Sufficiency of the Evidence*

[1] Code § 18.2-31 defines capital murder as a "willful, deliberate and premeditated killing" in the commission of certain felonies. The defendant argues that "the Commonwealth failed to prove beyond a reasonable doubt that the killing was premeditated." While the intent to kill must be the product of premeditation, in the determination of premeditation *vel non* the interval between the formation of the intent and the killing itself is not a controlling consideration. *Hairston v. Commonwealth*, 217 Va. 429, 431-32, 230 S.E.2d 626, 628 (1976). Yet, time may be relevant. According to Whitley's own extra-judicial statements, he choked his victim with his hands; from some source undisclosed by the record, he obtained a rope and strangled her; then, taking his knife from his pocket, he cut her throat. Plainly, this was not a killing conceived and executed instantaneously. Whitley had ample time to meditate and deliberate, and the savage techniques he employed evince a calculated, persistent intent to kill a defenseless person.

[2] The defendant contends that the statements he gave the police support a different theory, *viz.*, that "something in Mr. Whitley's conversation with his victim about church and his wife and stepdaughter provoked the fatal attack," that the killing was an act of "passion and uncontrolled

rage," and that this hypothesis is inconsistent with the jury's conclusion that the killing was premeditated. Obviously, the jury did not find this hypothesis reasonable, and we hold that the evidence was sufficient to sustain its conclusion.

Challenging the sufficiency of the evidence on another point, the defendant maintains that his conviction of capital murder in the commission of armed robbery "cannot be sustained unless there is evidence ... that he formed the specific intent to steal from the victim either *before or during* the killing". If the intent was not formed until the victim was dead, he says, "the taking would at most constitute a larceny and the killing first-degree murder." Pointing to certain comments the Commonwealth's Attorney made in closing argument which tend to endorse that view, Whitley relies upon the fact, uncontradicted of record, that all the property stolen was taken after Mrs. Parsons expired. Thus, he reasons, there was no evidence to prove that the murder was committed with intent to rob.

In oral argument, the Attorney General suggested that the language of Code § 18.2-31(d) could be construed to mean that first-degree murder is a capital offense when the killing and the crime of armed robbery are part of a continuing criminal enterprise. So construed, the statute does not require the Commonwealth to prove the coexistence of the intent to kill and the intent to steal. While such may be a viable construction, we need not decide that here. Reviewing the conviction under the statute as construed at trial, we consider whether the evidence was sufficient to support the conclusion that the murder was committed with intent to rob.

[3-5] Clearly, the theft Whitley confessed constituted robbery rather than simple larceny. Robbery, defined at common-law as "the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation", *Jones v. Commonwealth*, 218 Va. 18, 21, 235 S.E.2d 313, 315 (1977), is a crime against the person of the victim rather than a crime against property. While the violence or intimidation must precede or be concomitant with the taking, it is immaterial that the victim is dead when the theft occurs. For purposes of the common-law definition, a corpse is a "person" if "the taking occurs minutes after the victim is killed". *Wm. Patterson v. Commonwealth*, 222 Va. 658, 664, 283 S.E.2d 212, 219 (1981). The question, then, is whether robbery was the motive for the killing.

[6] Criminal intent, a state of mind, may be, and often must be, shown by circumstantial evidence. *Ridley v. Commonwealth*, 219 Va. 834, 836, 252 S.E.2d 313, 314 (1979). Whitley contends that, in light of the circumstances disclosed by his extra-judicial statements and the physical evidence, the jury should have found that the killing was the act of a "sexual psychopath" and that the larceny was committed "only as an after-thought." But the fact that the larceny did not occur until after he had killed his victim does not prove that his decision to steal was an after-thought. And the jury logically could have concluded that both sex and robbery motivated his conduct.

[7] Moreover, Whitley's hypothesis, offered in mitigation of the grade of his offense, is legally significant only if it is reasonably supported by the evidence viewed in the light most favorable to the Commonwealth. His theory ignores certain facts bearing upon the question of intent. Whitley had expressed an interest in acquiring a car owned by Mrs. Parsons' daughter. On the night of the crime, Whitley's car was "broken down." His next-door neighbor owned a car. Whitley stole Mrs. Parsons' car. The jury was not required to believe Whitley's statement that his purpose in entering Mrs. Parsons' home was to use her telephone, and the jury doubtless noted that the person to whom the calls allegedly were made was never asked to verify the allegation. Considering the totality of the circumstances disclosed at trial, the jury could have concluded that the defendant needed the use of a car; that his purpose in going to his neighbor's home

was to steal or borrow one; that his neighbor refused to give him the keys and turned the conversation to talk about his wife and "going to church and everything;" and that the defendant, frustrated, humiliated, and enraged, decided at that moment to kill her, ransack the house for the keys, and steal her car.

We are of opinion that the evidence was fully sufficient to support the conclusion that Whitley murdered Mrs. Parsons with intent to rob her of her automobile.[1]

B. *Admissibility of Evidence*

[8] Overruling the defendant's motion *in limine*, the trial court admitted into evidence a black-and-white photograph showing Mrs. Parsons' body in the gruesome condition in which it was found by the investigating officers. Assigning error to the ruling, Whitley argues that the photograph was inadmissible because it supplied no "probative evidence not provided by other evidence" and, therefore, that "the prejudicial effect of the exhibit outweighs its probative value."

We find no merit in this assignment of error. In a recent capital case, we rejected the same argument addressed to the admission of similar photographs.

> The admission of the photographs rested within the sound discretion of the trial court, and, in the absence of an abuse of discretion, we will not disturb the court's action. While the Commonwealth did have other evidence available to establish the elements of the offense, the photographs portrayed more graphically, but not more inflammatorily, than the testimony of any witness the methodical manner in which the killing of the victim was accomplished. Thus, the photographs were " 'relevant and material to establish premeditation and malice and to show the degree of atrociousness of the crime.' " (Citations omitted).

Waye v. Commonwealth, 219 Va. 683, 692, 251 S.E.2d 202, 208, *cert. denied*, 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292 (1979).

[9] Raising another challenge to the presentation of evidence, the defendant says that "the Commonwealth's attempted introduction into evidence of other crimes involving Mr. Whitley deprived him of ... a fair trial and ... due process of law."

In the course of rebuttal to the defendant's cross-examination of one of the officers who had interviewed him, the Commonwealth's Attorney asked if Whitley had explained why his wife had left him. The officer replied: "He stated that there had been some trouble with his daughter and that she took the daughter." Asked if Whitley had told him "what happened with the daughter" or "why the daughter had left", the officer answered, "No, sir."

The defendant asserts that "the Commonwealth Attorney's questions were intended to imply sexual improprieties involving Mr. Whitley and his daughter"; that "[e]vidence of prior bad acts is incompetent and inadmissible"; and that the asking of the questions "constituted reversible error."

As the transcript of the officer's testimony on cross-examination reveals, the defendant had initiated the line of questioning pursued by the Commonwealth's Attorney in rebuttal. And we observe that, while defense counsel objected to his questions on relevancy grounds, he did not assign the ground he urges on appeal. Nor did he move for a mistrial or seek a curative instruction on account of the prejudice he now perceives. Aside from these considera-

1. Attacking the ruling against his motion to strike the evidence as insufficient, the defendant also charges that he was denied due process because, he says, the trial judge did not consider his motion maturely and ruled peremptorily "with one eye on the proceedings and one eye on the clock." The transcript of the proceedings does not support the charge. The comments made by the trial judge concerning the hour were related to his decision whether to attempt to complete the evidence that day or the next. At the conclusion of the defendant's argument on his motion, the transcript of which consumes 13 pages in the record, the trial judge denied the motion and assigned the reason for his ruling: "Viewing all the evidence that has been submitted it is my opinion that his intent and motive is entirely a jury question." It is obvious that the judge carefully considered the defendant's challenge to the sufficiency of the evidence and, as we have indicated, his ruling was correct.

tions, we demur to Whitley's due process complaint because he has shown no prejudice. As we read the dialogue, the implication raised by the questions and answers was speculative at most, and we cannot assume that the jury drew the inference Whitley suggests in hindsight.

C. *Improper Argument*

[10] During summation in chief, the Commonwealth's Attorney said: "If at any moment before he kills her he intends to steal what she owns he is guilty of capital murder, that's the law.... He killed her, he stole from her. All we have to do is look at those facts and we say, could he possibly have intended that." This, the defendant contends, was a prejudicial misstatement of the Commonwealth's burden of proof. The Attorney General responds that the error, if any, was cured because the instructions (which were read to the jury by the trial judge and delivered in written form to the jury room) correctly defined the burden of proof.

During rebuttal argument, the Commonwealth's Attorney stated: "Members of the jury, I waited in vain for counsel to give you some reason that this defendant ... may have engaged in all of that violence before he stole this woman's property. As I say, I waited in vain." Whitley characterizes this statement as a comment on the defendant's failure to testify in violation of his Fifth Amendment right to remain silent. Rebutting this view and invoking the test adopted in *Hines v. Commonwealth*, 217 Va. 905, 907, 234 S.E.2d 282, 283 (1977), the Attorney General argues that the statement was a comment on the failure of the defendant's *counsel* to offer some explanation during closing argument for the violence preceding the larceny and not a comment on the defendant's failure to take the stand.

The Attorney General's arguments appear persuasive. However, the record shows that the defendant voiced no objection to either statement, either at the time it was made or in post-conviction motions. Applying the contemporaneous objection rule, we decline to consider these issues on their merits. *Shifflett v. Commonwealth*, 212 Va. 741, 744, 187 S.E.2d 174, 176 (1972); *Russo v. Commonwealth*, 207 Va. 251, 257–58, 148 S.E.2d 820, 825 (1966).

II. CONSTITUTIONAL CHALLENGES

A. *Facial Constitutionality*

The defendant asks us to adopt the view that the death penalty constitutes cruel and unusual punishment "in all cases". We reaffirm our prior decisions disavowing a *per se* rule.

Even so, Whitley contends that "the Virginia capital murder statute is unconstitutional on its face". More precisely, he believes that the legislative gradation of homicide offenses is constitutionally infirm. A person convicted of one of the species of homicide defined in Code § 18.2-31 may be sentenced to death, regardless of the degree of vileness attending the killing, if the jury rests its decision upon the so-called "dangerousness" standard. Code § 19.2-264.2. On the other hand, a person convicted of first-degree murder is never subject to the supreme penalty, even when the vileness is greatest and the offense most heinous. Hence, Whitley argues, the homicide statutes permit juries to impose the death penalty arbitrarily and capriciously in violation of the due process clause and the Eighth Amendment.

[11] A criminal statute which affords a sentencing judge or jury an unbridled choice between the death penalty and a lesser sentence violates the Eighth and Fourteenth Amendments. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). But sentencing discretion is constitutionally permissible if it is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976). The *Gregg* court upheld Georgia's statutory system (revised in response to *Furman*) because it limited discretion to impose the death penalty to offenses involving "aggravating circumstances", established standards directing sentencing procedures, and

authorized appellate review as a matter of right. In *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), the Supreme Court found that, while the Texas statute did not contain a particularized list of aggravating circumstances, its definitions of the five categories of capital murder required "that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed", *id.* at 270–71, 96 S.Ct. at 2955–56, and that these definitions satisfied the rule in *Gregg*.

Five of the seven definitions of capital murder in Code § 18.2–31 are substantially identical, and none are antithetical, to those approved in *Jurek*. See relevant provisions of the Texas statute, *id.* at 265, n. 1, 96 S.Ct. at 2953, n. 1. And, of special significance to the issue Whitley raises here, the Texas statute, like our own, fixed the maximum penalty for non-capital murder at life imprisonment. *Id.* For purposes of constitutional analysis, the two statutory schemes are indistinguishable.

[12] Homicide statutes are designed to protect society. The need for protection varies with the gravity of the offense against society. The definition and gradation of offenses require public policy judgments. Such judgments are made for society by the legislative representatives it chooses. And such legislative judgments are constitutionally sufficient unless the courts can say that the severity of the penalty prescribed is not rationally related to the gravity of the attendant offense.

[13] The General Assembly has defined two grades of manslaughter, three grades of murder, and seven sub-species of the highest grade of murder. It has determined that, aside from the kind of violence employed, murder committed under any of seven selected circumstances is more culpable in terms of societal harm than other forms of murder, and, as a matter of public policy, has prescribed graduated penalties for different grades of homicide.

We believe the grades of the offense and their respective penalties are rationally related, and, considering the sentencing standards and procedures the capital murder statutes mandate, we hold that sentencing discretion is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189, 96 S.Ct. at 2932.

B. *Constitutionality As Applied*

[14] Whitley next contends that the so-called "vileness" standard of Code § 19.2–264.2 is unconstitutional as applied in his case.

The jury based the death penalty upon the vileness standard rather than the dangerousness standard. Relying upon the plurality opinion in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the defendant urges us to construe the vileness standard to mean that the death penalty is not a constitutionally-permissible sentencing option unless " 'aggravated battery' be proven by evidence of serious physical abuse before death." Here, Whitley insists, "the evidence conclusively shows that the victim died prior to any physical abuse".

The statutory construction Whitley urges, one announced by the Georgia Supreme Court in *Blake v. State*, 239 Ga. 292, 236 S.E.2d 627 (1977), and noted in passing in *Godfrey*, was not the *rationa decidendi* in *Godfrey*. Godfrey's victim died almost instantaneously from a single gunshot, and the defendant's sentence was "based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' " *Godfrey*, 446 U.S. at 428, 100 S.Ct. at 1765. Such an amorphous finding, unrelated to any constituent element of the statutory definition, was constitutionally insufficient to support the death penalty. The Supreme Court was not required to decide, and did not decide, whether an aggravated battery must precede the victim's death in order to satisfy the vileness standard.

Nor need we decide that question here, for the evidence fully supports the conclusion that Mrs. Parsons' death was the result of aggravated battery upon her person. We do not refer to Whitley's violent abuse

of her body cavities, even though the medical testimony does not exclude the possibility that her heart was still beating when the umbrellas were inserted. We have construed the term "aggravated battery" as used in Code § 19.2-264.2 to mean "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979). According to Whitley's own account, he first choked his defenseless victim with his bare hands; next, he acquired a rope and strangled her; and then, taking his knife from his pocket, he cut her throat. Each of Whitley's several acts was deliberate, each was brutal and potentially fatal, and, together, all were more than the minimum necessary to accomplish the murder.

We are of opinion that the jury properly could have found that Whitley's serial assaults upon Mrs. Parsons constituted an aggravated battery within the intendment of the statutory vileness standard, and we reject his constitutional complaint.

III. THE POST-CONVICTION HEARING

[15] Code § 19.2-264.5 provides that, after consideration of a report of a probation officer concerning "the history of the defendant and any and all other relevant facts", the trial judge "may set aside the sentence of death and impose a sentence of imprisonment for life." As Whitley points out, the narrative portion of the historical report revealed that he had been "accused" of three forcible sexual offenses, and Whitley argues that, notwithstanding the jury's failure to do so, the trial judge should have accepted his theory that sex rather than robbery was the motive for the killing. Accordingly, he asserts the trial judge erred in confirming the jury's verdict.

But the probation report also contained a long list of charges and convictions of automobile larceny, burglary, breaking and entering, and other crimes, as a result of which, Whitley had "spent most of his adult life incarcerated in ... Illinois or ... Nevada". Such a history, inadmissible at the guilt trial, reinforces the jury's finding that the killing occurred in the commission of armed robbery of Mrs. Parsons' car, and we hold that the trial court committed no error in confirming the jury's verdict.

IV. THE PENALTY TRIAL

[16] Under statutory mandate, we now review the record of both phases of the trial to determine whether the death penalty fixed by the jury and confirmed by the trial judge was the product of "passion, prejudice or any other arbitrary factor" or "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Code § 17-110.1C.

Renewing his argument that the motive for the killing was not robbery, Whitley contends that "evidence and argument in the guilt phase which evidenced sexual abuses ... were in no way probative of an intent to rob" and that the effect thereof was "to inflame the jury and to cause them to be prejudiced against Mr. Whitley." Whitley does not specify the "sexual abuses" to which he refers. Those mentioned in the probation report were not before the jury. Code § 19.2-264.4B. Those discussed in Part I B, *infra*, were not reasonably implied. We assume, then, that the defendant has reference to the medical evidence showing the abuses of Mrs. Parsons' body cavities.

Whitley did not challenge the admissibility of this evidence. Rather, he contends on

2. On appeal, Whitley complains that the jury was not instructed on this definition. *See Godfrey*, 446 U.S. at 437, 100 S.Ct. at 1769 (Marshall and Brennan, concurring). *Contra, James Dyral Briley v. Commonwealth*, 221 Va. 563, 579-80, 273 S.E.2d 57, 67 (1980); *Clark v. Commonwealth*, 220 Va. 201, 211, 257 S.E.2d 784, 790-91 (1979), *cert. denied*, 444 U.S. 1049, 100 S.Ct. 741, 62 L.Ed.2d 736 (1980). The record shows the defendant did not offer or request such an instruction at trial, and we will not notice a non-jurisdictional question raised for the first time in a reply brief filed in this Court. Rule 5:21.

appeal that it was prejudiciously inflammatory. We have no doubt that it offended the sensibilities of the jury. But while evidence of Whitley's use of the umbrellas was offensive, so was the evidence of his use of the rope and knife, assaults committed in pitiless disregard of a defenseless victim's pleas for mercy.

The defendant suggests nothing further to support his argument that the death penalty was the product of passion or prejudice, and, finding nothing of record, we turn to the final question.

Relying again upon his theory that Mrs. Parsons' death did not occur in the commission of armed robbery and, thus, that the killing did not constitute capital murder, Whitley argues that we must compare his case with other non-capital murder cases "in which the victim was sexually abused but not raped or robbed." Such a comparison, he says, compels a conclusion that "Whitley's sentence is clearly excessive and disproportionate."

But we have held that the evidence supports the jury's finding that the murder occurred in the commission of armed robbery and that Whitley's multiple assaults constituted an aggravated battery within the contemplation of the vileness standard. Whitley's argument, therefore, rests upon a faulty premise.

In order to guard against arbitrary, capricious, and discriminatory imposition of the death penalty, Code § 17-110.1C2, E, requires that we compare the case under review with "similar cases" and, in aid of that comparison, to "accumulate the records of all capital felony cases . . . as a guide in determining whether the sentence imposed in the case under review is excessive." In the first case decided after the effective date of that statute, we entered an order directing the Clerk of this Court to comply with the legislative directive. *See Smith v. Commonwealth*, 219 Va. at 482, n. 8, 248 S.E.2d at 151. The Clerk has done so. All capital murder cases, including not only those in which the death penalty was imposed and reviewed by this Court but also those in which the jury or trial judge imposed a life sentence and the defendant petitioned this Court for appeal of his conviction, have been inventoried and indexed apart from other criminal cases.

We have analyzed the facts and circumstances in each case. None is factually *identical* to Whitley's case. However, we have affirmed death sentences in several capital murder cases where the aggravated battery was fairly comparable to that Whitley committed.[2] And it appears from our examination of capital cases where a life sentence was imposed that the lesser penalty was selected because the battery was less aggravated, or because the jury or trial judge found that the aggravating circumstances were outweighed by mitigating circumstances, or because the sentencing authority was moved by an impulse of mercy. Such discretion in the sentencing authority is not constitutionally infirm. The Constitution requires only that the jury's exercise of its discretion be properly guided. "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." *Gregg*, 428 U.S. at 199, 96 S.Ct. at 2932. *Accord, Smith v. Commonwealth*, 219 Va. at 479-80, 248 S.E.2d at 150.

Our analysis convinces us that the penalty imposed upon Whitley was not "excessive or disproportionate to the penalty imposed in similar cases", Code § 17-110.1C2, and we will affirm the conviction and uphold the death penalty.

Affirmed.

2. *Justus v. Commonwealth*, — Va. —, 283 S.E.2d 905 (1981) (pregnant victim raped; killed by three equally fatal gunshot wounds to head); *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979), *cert. denied* 444 U.S. 1103, 100 S.Ct. 1069, 62 L.Ed.2d 788 (1980) (victim beaten repeatedly, choked; death resulted from blows to head); *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979), *cert. denied* 444 U.S. 1049, 100 S.Ct. 741, 62 L.Ed.2d 736 (1980) (defendant attempted to chloroform victim; struggle ensued; victim shot five times at close range).

FEB/kss

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	CRIMINAL NUMBER 32737
	)	
VERSUS	)	INDICTMENT - Capital Murder
	)	
RICHARD LEE WHITLEY	)	

This 12th day of June, 1981, came the Commonwealth, by her Attorney, and the Defendant, RICHARD LEE WHITLEY, who stands convicted of a felony, to-wit: Capital Murder, being confined in jail was brought into Court and put to the bar of the Court in the custody of the Deputy Sheriff; also appeared Warren McLain and Ian Rodway, Co-Counsel for the Defendant.

Thereupon, the Court Reporter was sworn.

And the Probation Officer of this Court to whom this case had been previously referred for investigation appeared in open Court with a written report, copies of which had previously been furnished to Counsel for the Defendant, Attorney for the Commonwealth and the Court. Counsel for the Defendant then advised the Court that he had discussed the report with the Defendant and the Defendant was fully advised of the contents thereof.

Whereupon, the accused and his Counsel were given the right to cross-examine the Probation Officer as to any matter contained in said report and to present any additional evidence as they desired to present. Whereupon, Counsel for the Defendant advised the Court of several corrections to be made to the report filed by the Probation Officer. The report of the Probation Officer, as amended, is filed herein and made a part of the record of this case.

Whereupon, the Attorney for the Commonwealth was given the opportunity to present evidence and elected not to do so.

Whereupon, the Court heard argument of Counsel.

Thereupon, it was demanded of him, RICHARD LEE WHITLEY, if anything he knew or had to say why the Court should not proceed to pass sentence and judgment upon him and nothing was offered or alleged in delay of judgment.

Whereupon, the Court, after presiding at both proceedings in this case and after independantly reviewing all of the evidence and hearing argument of Counsel, hereby finds that the sentence of death heretofore recommended by the Jury is appropriate and just.

It is therefore ADJUDGED and ORDERED that the Defendant, RICHARD LEE WHITLEY, die by electrocution in the electric chair within the confines of the State Penitentiary in Richmond, Virginia, on the 29th day of March, 1982.

Whereupon, the Court ORDERED that the Clerk of the Circuit Court cause the proceedings in this case to be transcribed and filed with the Clerk of the Circuit Court as expeditiously as practicable and further ORDERED that the Clerk of the Circuit Court compile the record in this case as provided in Rule 5:14 and transmit it to the Supreme Court of Virginia within ten (10) days of receipt of the said transcription for review by the Supreme Court of Virginia.

Warren McLain, Attorney at Law, is hereby appointed to represent the Defendant in the appeal of this case.

Warren McLain, Attorney at Law, who was heretofore appointed to represent the Defendant in this case is hereby allowed a fee of $ 2000.00

Ian Rodway, Attorney at Law, who was heretofore appointed to represent the Defendant in this case is hereby allowed a fee of $ 2000.00

The fee of the Court Reporter who recorded the evidence and incidents of trial in this case is hereby assessed as costs, as provided in Section 19.2-165 of the 1950 Code of Virginia, as amended.

The Court certifies that the Defendant was present during all stages of this trial.

The Defendant is hereby remanded to jail to await transportation to the Penitentiary.

F. Bruce Bach

JUDGE F. BRUCE BACH

THE COURT: I'm going to ask you to go to the jury room in approximately 15 minutes, Ladies and Gentlemen of the Jury, to hopefully complete all the evidence today.

(The Jury retired from the courtroom.)

MR. MCLAIN: Your Honor, at this time the Defense would make a motion to strike the Commonwealth's case as to capital murder.

This Court knows and it's from the indictment, it stated that on or about the 25th day of July, 1980, in the County of Fairfax, Richard Lee Whitley, did willfully, deliberately, premeditatedly, feloneously, kill and murder Phebe C. Parsons while in the commission of a robbery while armed with a deadly weapon under Code Section 18.2-231-D.

In support of the motion to strike, Your Honor, I have an argument in regard to, first of all, where the Court can see in the statement that was put into evidence by the Commonwealth which Investigator Sutherland took from Mr. Whitley, of course, in his statement which he says there was no money taken.

This statement, I think, is corroborated on a couple of occasions where Mr. Whitley was interviewed,

and I believe Investigator Sutherland testified that Mr. Whitley's statements to him throughout were consistent.

The Defense's position is that this did not occur during the course of the murder, the commission of a robbery.

I also believe that the photographs which have been introduced into evidence, specifically, the Exhibits, Commonwealth Exhibit No. 4 and Commonwealth Exhibit, I believe Nos. 5 and 6 which show, first of all, the fact that the large concentration of blood was in the living room, and that a path of footsteps, footprints lead down the hallway, and I believe Mr. Rodway had stated in opening statement that the robbery was more or less an afterthought as Mr. Whitley left the back door of the house

We also know that the purse in this case, which we believe the wallet and the credit cards were obtained, was in the kitchen. We believe that Mrs. Parsons' daughter testified that that's where it was kept, on a hook, and I believe that's where it was found.

Your Honor, the Commonwealth has the burden of proving, I know not at this stage necessarily, beyond a reasonable doubt that it's capital muder, but we would submit, and the evidence in the light that it is at this

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point, that they have not established that.

The one case, I believe, Your Honor, that is important and in our consideration for the motion to strike is Ball versus the Commonwealth decided on the 16th of January of this year by the Supreme Court of Virginia reported in the VRR, the citation is 221-VRR-762.

The Supreme Court reversed a conviction for capital murder in that case which was under the same Section, 18.2-231-D. I believe in that case as in the majority of cases that have been decided by the Supreme Court of Virginia under Section 18.2-231-D --

THE COURT: Is that where he shot the man behind the counter?

MR. MCLAIN: No, Your Honor, that was another case. I believe that was Turner versus Commonwealth.

This particular case, Ball, was where an individual went into a store during the course of attempted robbery. Apparently, the victim's father was also present who observed the defendant who was dressed in women's clothes and had a handbag with a loaded gun in it. Apparently, there was a struggle for the gun. I think the defendant asked the victim for money, demanded money, and there was a struggle and the victim in that case was

THE COURT: Thank you, Mr. McLain. The motion to strike is denied.

MR. MCLAIN: Would you note our exception.

THE COURT: Viewing all the evidence that has been submitted it is my opinion that his intent and motive is entirely a Jury question.

MR. MCLAIN: Your Honor, we would call Mr. Monahan.

Whereupon,

GARRY MONAHAN

a witness, was called for examination on behalf of the Defendant, and, after having been duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MCLAIN:

Q Mr. Monahan, would you please state your name for the Jury?

A Garry Monahan.

Q Where do you live, Garry?

A In Falls Church.

Q And, how are you employed?

A I'm self-employed. I'm a contractor.

Q What's the name of your business?

THE COURT: Do you all have anything else you'd like to say?

MR. McLAIN: No, I don't.

THE COURT: Mr. Whitley, is there anything you'd like to now say or any reason why I should not now impose judgment on you?

THE DEFENDANT: No, I have nothing to say.

THE COURT: Well, I have sat as judge in both stages of the trial and, of course, in this proceeding here today; and as Mr. McLain said, I am familiar with all the facts of the case.

I have independently reviewed the jury's verdict, based on the evidence in both phases of the trial, I have independently reviewed the presentence report. I can find no fault, whatsoever, in the jury's verdicts in any of the phases.

I can find nothing to mitigate the crime, and I do find a sentence of death to be appropriate and just.

Mr. Whitley, I sentence you to death by electrocution. The date of your execution shall be March 29, 1982. There will be an automatic appeal. A record will be prepared of this proceeding at the earliest possible date and transmitted to Richmond. Mr. Rodway and Mr. McLain, do you

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want to continue on on this appeal?

MR. RODWAY: Your Honor, please. Since this is the second time I've been involved in a case like this, I think it's better, Your Honor, if another set of attorneys be appointed in case we did something that was inappropriate, Your Honor.

THE COURT: I will, today, appoint other attorneys.

MR. RODWAY: Thank you.

(Whereupon, at 9:17 o'clock a.m., the hearing in the above-entitled matter was concluded.)

* * *

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

November 17, 1980

COMMONWEALTH OF VIRGINIA	)	
	)	INDICTMENT FOR
vs.	)	
	)	CAPITAL MURDER
RICHARD LEE WHITLEY	)	

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Fairfax, and now attending the said Court at its November Term, 1980, charges that: On or about the 25th day of July, 1980, in the County of Fairfax, Richard Lee Whitley did willfully, deliberately, premeditatedly, and feloniously kill and murder Phebe C. Parsons while in the commission of a robbery while armed with a deadly weapon.

Va. Code Section 18.2-31(d)

A True Bill_____

No True Bill_____

_____

F O R E M A N

Witnesses subpoenaed, sworn and available to testify before the Grand Jury:

Off. A. P. Johnson, Fairfax County Police Dept.

WARRANT OF ARREST

COMMONWEALTH OF VIRGINIA, COUNTY OF FAIRFAX:

To Any Law Enforcement Officer of the Commonwealth:

Whereas, Investigator J. C. Sutherland (COMPLAINANT) of Fairfax County Police Departme

has this day made proper complaint before me under oath, and

Whereas, on the grounds of said complaint I have found probable cause to believe that Richard Lee Whitley (DEFENDANT)

a W (RACE) M (SEX) born 5/6/46 (BIRTHDATE) who can be located at 7720 Lisle Av. Falls Church (ADDRESS)

Virginia did, in the County aforesaid, on or about the 25 day

of July, 19 80, unlawfully and feloniously, in violation of State Code, Section 18.2-32

of the 1950 Code of Virginia as amended kill and murder Phebe C. Parsons

These, Therefore, are to command you in the name of the Commonwealth to forthwith apprehend and bring before the Fairfax County General District Court at Fairfax County, Virginia on the 19TH day of AUGUST, 19 80 at 9:30 o'clock A. M. the subject to answer the said complaint and to be further dealt with according to law and there have this warrant with your return.

Given under my hand this 29th day of July, 19 80.

Kenneth A. Frith

Special Magistrate

Kenneth A. Frith #88

F80- 06311

CTS-CTC-4C

THE FAIRFAX COUNTY GENERAL DISTRICT COURT — ORDERS OF THE COURT

80 09317

THE WITHIN NAMED defendant on this 1 day of _____, 19___ ☐ forfeited collateral in the amount of $ _____, o. ☐ was tried in his absence, or ☐ came before me, and, ☐ being represented by counsel, or ☐ not being represented by counsel and waiving his right to same, pleaded ☐ guilty ☐ not guilty, and upon hearing the evidence in this matter, I find him ☐ guilty ☐ not guilty and adjudge a fine of $ _____ and costs and order the defendant confined in jail for a period of _____ days _____ months, suspending $ _____ and _____ days _____ months on the following conditions: a) general good behavior for one year, b) that defendant violate no law of the Commonwealth for one year and, c) _____

And it is further ordered that:

- ☐ The case be dismissed;
- ☐ The case be terminated Nolle Prosequi;
- ☐ The case be certified to the Grand Jury;
- ☐ Defendant's operators license be revoked for _____ days _____ months, until fine is paid
- ☐ This disposition having been made upon recommendation of Commonwealth's Attorney _____

And that:

- ☐ Execution of the sentence be suspended until _____, 19___, at _____ o'clock P.M.
- ☐ Operators license accepted in lieu of bond
- ☐ A pre-sentence investigation is ordered returnable _____, 19___, at _____ o'clock P.M.
- ☐ Defendant be placed on active probation for one year.

_____
Judge

$100.00 8/18/80

WARRANT OF ARREST

COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX
Vs.

Robert Lee Whitley

Executed this, the 15 day of August, 19 80 by arresting the within named

_____

J. Shotwell
Officer

COSTS

State Fine	$
Local Fine	$
Trial Fee	$
Mag. Bail Fee	$
Summons Fee	$
Criminal Filing Fee (Circuit)	$
CICF	$
Ct. Appt. Atty. (State)	$
Ct. Appt. Atty. (Local)	$
DMV Fee	$
Blood Test Fee	$
ASAP	$
Weighing Fee	$
Liquidated Damages	$
Witness Attendance	$
Total	$

COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX

To-wit We, _____

and _____ do hereby severally and respectfully acknowledge ourselves to be indebted to the Commonwealth of Virginia, in the sum of $ _____ to be respectfully made and levied on our several goods and chattels, land and tenements, to the use of the Commonwealth, and we each waive all benefits under the homestead exemption laws of the State of Virginia as to this obligation, the conditions of this obligation being that _____ shall (1) personally appear before the Fairfax County General District Court on the _____ day of _____, 19___ at 9:30 o'clock A.M. and at any times thereafter when proceedings in this matter may be heard by any court or judge, (2) shall not depart hence without leave of said court, (3) shall refrain from violating any law of this Commonwealth during the pendancy of this recognizance, which remains in full force and effect until terminated by operation of the law; and that (4) nonappearance before any court in this matter shall be deemed a waiver of defendant's right to have counsel appointed for him and (5) nonappearance before any Circuit Court may be deemed a waiver of the right to a trial by jury.

Given under our hand and seal this the _____ day of _____, 19___.

_____ (SEAL) _____ (SEAL)

_____ (SEAL) _____ (SEAL)

Acknowledged before me, in the said County, the day and year last above written.

_____
Address of Surety

_____
Special Magistrate for Fairfax County, Virginia

RECEIVED
JUL 6 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-6861

RICHARD LEE WHITLEY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI

GERALD L. BALILES
Attorney General of Virginia

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Assistant Attorney General

Supreme Court Building
101 North Eighth Street - 6th Floor
Richmond, Virginia 23219

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-6861

RICHARD LEE WHITLEY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The Commonwealth of Virginia, the respondent herein, respectfully prays that a writ of certiorari to the judgment of the Supreme Court of Virginia entered in this case on January 22, 1982, not be granted.

For purposes of uniformity, the parties will hereinafter be referred to as the petitioner and the respondent, and all page references will be to the Joint Appendix filed in the Supreme Court of Virginia by the petitioner and respondent and designated (App. ____), and to the Supplemental Appendix filed therein by the respondent and designated (Supp. App. ____).

OPINION BELOW

The opinion of the Supreme Court of Virginia affirming the judgment of the Circuit Court of Fairfax County is reported

at 223 Va. ____, 286 S.E.2d 162 (1982). The unreported opinion of the Supreme Court of Virginia denying petitioner's Petition for Rehearing is set forth in the Appendix to the petition for a writ of certiorari at p. 3a.

JURISDICTION

The petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. Whether petitioner was denied due process of law and subjected to cruel and unusual punishment because his death sentence rests upon a finding of an "aggravated battery" which is defined by the Supreme Court of Virginia as being "more culpable than the minimum necessary to accomplish an act of murder?"

II. Did the Supreme Court of Virginia impermissibly shift the burden of proving that petitioner's motive for committing murder was something other than robbery to petitioner, thus refusing to apply Virginia law that the Commonwealth must disprove beyond a reasonable doubt all reasonable hypotheses of innocence?

STATEMENT OF THE CASE

On July 25, 1980, the petitioner, Richard Lee Whitley, entered the house of Mrs. Phebe C. Parsons, a 63-year-old widow and his next door neighbor. He began choking Mrs. Parsons in her living room with his hands. They fell to the floor and petitioner then began choking her with a rope. After choking Mrs. Parsons, he took a knife from his pocket and cut her throat. (App. 14-15).

Petitioner picked Mrs. Parsons up under her arms and dragged her into a bedroom, leaving her on the floor. He then commenced ransacking her house in order to find a gun he was looking for. (App. 12). Petitioner never found the gun, but did take several credit cards and the keys to Mrs. Parsons' automobile. (App. 13). There was evidence that Mrs. Parsons' wallet had been taken from her purse. (App. 61). Petitioner then took Mrs. Parsons' automobile and traveled to Florida (App.

18). The month before, petitioner had discussed buying an automobile from the victim's daughter. (Supp. App. 1-2).

On July 28, 1980, Mrs. Parsons' daughters visited her house because they had not heard from her. Upon entering the house, Susan Parsons noticed that paper was all over the floor, a lamp was knocked over, furniture was out of place and magazines were spread across the room. She also noticed a "lot of stains on the rug." (App. 64). Upon entering her mother's bedroom, she saw that clothing had been piled on the floor and that the bureau was messed up. She subsequently smelled the odor from her mother's decomposing body and saw a foot sticking from under the pile of clothes on the floor. (App. 65).

The police responded to a call from Susan Parsons, found the house in general disarray, and noticed that it had been ransacked. (App. 75-76). In addition, they found a large quantity of blood on the living room floor, and noticed blood-soaked women's underclothing, shoes and a shirt; following bloody footprints down the hallway to a bedroom, they saw the victim's foot sticking out from under the pile of clothes. (App. 77). After uncovering the body, they noticed that umbrellas had been inserted in Mrs. Parsons' vagina and anus, that a bloody palmprint had been left on the door leading into the room (later identified as petitioner's), and that a bloody footprint was in the middle of Mrs. Parsons' back. (App. 77-79, 86).

An autopsy of the victim's body revealed numerous injuries, including various bruises and lacerations, ligature marks on the neck, and a slash type wound in the left side of the neck four and three fourths inches long which gaped two inches and involved two major veins that had been severed. (App. 67-69). Besides these wounds, the two umbrellas which had been inserted into Mrs. Parsons' vagina and rectum had broken through the interior walls

of tissue. (App. 72-73). The autopsy showed that the victim's death could have been caused by either the strangulation or the wounds on her neck. (App. 69).

On August 1, 1980, Mrs. Parsons' green VW Rabbit was located in Okeechobee, Florida, by the police. Found in the auto were Exxon and Chevron gas receipts with the imprint of Mrs. Parsons' credit cards on them and a Rand McNally Road Atlas. (App. 98-100). The petitioner's fingerprints were on the atlas. (App. 135-136).

Petitioner was subsequently arrested in Florida and returned to Fairfax County. He admitted that he had killed Mrs. Parsons (App. 10-23) and took the Fairfax police to a spot on an interstate highway where he had thrown some of her clothes. Among the clothes was found a small medallion which had belonged to Mrs. Parsons' deceased husband. (App. 110-111, 130-131).

On May 13, 1981, the petitioner was convicted by a jury of capital murder in the commission of a robbery in violation of § 18.2-31(d) of the Code of Virginia (1950), as amended. (App. 191-193). At the penalty phase of petitioner's trial, evidence was introduced showing that petitioner had told the Florida police that the last thing Mrs. Parsons did was to pray that he would not kill her, and that he cut her jugular vein because "they die quicker when you cut them there." (App. 199-200). Evidence was also introduced at the sentencing phase showing that petitioner knew it was wrong to kill Mrs. Parsons and that he could have stopped the murder if he had wanted to. (App. 208).

The jury recommended a sentence of death (App. 224-225), and on June 12, 1981, the trial court affirmed the jury's recommendation and sentenced petitioner to death. (App. 237). Petitioner then appealed his conviction and death sentence to the Supreme Court of Virginia, which accorded his case a priority status. On January 22, 1982, the Supreme Court of Virginia

affirmed petitioner's conviction and held that the penalty imposed was neither excessive nor disproportionate. On March 12, 1982, the Supreme Court of Virginia, finding no merit to the grounds assigned by petitioner, denied petitioner's Petition for Rehearing.

ARGUMENT

I. THE PETITIONER WAS NOT DENIED DUE PROCESS OF LAW AND WAS NOT SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BECAUSE HIS DEATH PENALTY RESTS UPON A FINDING OF AN "AGGRAVATED BATTERY" WHICH IS DEFINED BY THE SUPREME COURT OF VIRGINIA AS BEING "MORE CULPABLE THAN THE MINIMUM NECESSARY TO ACCOMPLISH AN ACT OF MURDER."

Section 19.2-264.4C of the Code of Virginia (1950), as amended, provides that the death penalty shall not be imposed unless the Commonwealth proves beyond a reasonable doubt that the defendant constitutes a continuing serious threat to society because there is a probability that he will commit criminal acts of violence in the future or that the defendant's conduct in the case at hand was "outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." The first aggravating circumstance, dealing with the future "dangerousness" of the defendant, is not involved in the instant case. Rather, petitioner's death sentence rests on the second circumstance dealing with the "vileness" of his crime.

Petitioner, while admitting that Code § 19.2-264.4C's "vileness" circumstance is identical to the aggravated circumstance found to be constitutionally sound by this Court in Gregg v. Georgia, 428 U.S. 153 (1976), argues that the definition of "aggravated battery" adopted by the Supreme Court of Virginia is vague, overbroad and did not constitutionally limit the jury's discretion in ascertaining whether petitioner should be sentenced to death.

The respondent notes, however, that, in Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135 (1978), cert. denied,

441 U.S. 967 (1979), the Virginia Supreme Court construed the words "depravity of mind" to mean a degree of moral turpitude and physical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation. The court further construed the words "aggravated battery" to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder.

The respondent submits, therefore, that the Supreme Court of Virginia has narrowed the definition of "aggravated battery" into language which can be easily understood. And this definition certainly gives a reasonably intelligent person fair notice that his contemplated conduct is forbidden by the statute. There is thus nothing vague or overbroad about the manner in which the Supreme Court of Virginia has defined the "vileness" aggravating circumstance as petitioner asserts. It must be recognized that only so much can be done with the English language, and the terms used by the Supreme Court of Virginia have commonly accepted meanings. Indeed, as this Court noted in Gregg with respect to Georgia's "vileness" statute, "[T]here is no reason to think the juries will not be able to understand it." 428 U.S. at 202 n. 54.

In Proffitt v. Florida, 428 U.S. 242 (1976), this Court concluded that determining aggravating circumstances may be hard, but they require no more line drawing than is commonly required of a fact-finder in a law suit. This Court further found that "the requirements of Furman [v. Georgia, 408 U.S. 238 (1972)] were satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." 428 U.S. at 258.

Petitioner, of course, asserts that in his case the Supreme Court of Virginia did not limit this arbitrariness and

capriciousness and compares his case to that of Godfrey v. Georgia, 446 U.S. 420 (1980). In Godfrey, a plurality of this Court concluded that the Georgia Supreme Court had adopted an overbroad and vague construction of the "vileness" circumstance in that particular case, but the facts of Godfrey are clearly different from the case at bar: The defendant in Godfrey (who was suffering from severe marital difficulties), after having a heated argument with his wife over the telephone, went to the trailer home where she was staying with her mother and daughter. There, he shot and instantly killed his wife and mother-in-law. At trial, the prosecutor conceded the absence of an "aggravated battery", thus leaving only "depravity of mind" as a remaining possibility. And the trial judge stated that there had been no physical harm or torture beyond the actual murders.

Respondent submits that the Supreme Court of Virginia was thoroughly justified in determining that petitioner's case is distinguishable from Godfrey, thus permitting a conclusion that petitioner had committed an "aggravated battery." First, the respondent notes that petitioner's emphasis on the Supreme Court of Virginia's comment in the instant case that "[t]he Supreme Court [in Godfrey] was not required to decide, and did not decide, whether an aggravated battery must precede the victim's death in order to satisfy the vileness standard," 286 S.E.2d at 169, is taken out of context and ignores the Virginia Supreme Court's actual holding in his case. After making this comment, which the respondent submits is an accurate analysis of Godfrey, the Court stated in the very next sentence as follows: "Nor need we decide that question here, for the evidence fully supports the conclusion that Mrs. Parson's death was the result of aggravated battery upon her person." (Emphasis added). Id. The Virginia High Court then went on to outline the "aggravated battery" which had been perpetrated on Mrs.

Parsons by the petitioner before her death:

> According to Whitley's own account, he first choked his defenseless victim with his bare hands; next, he acquired a rope and strangled her; and then, taking his knife from his pocket, he cut her throat. Each of Whitley's several acts was deliberate, each was brutal and potentially fatal, and, together, all were more than the minimum necessary to accomplish the murder. Id. at 170.

Indeed, the respondent notes that the Virginia Supreme Court specifically refuted petitioner's present claim that the only "aggravated battery" [1] to Mrs. Parsons did not take place until after her death: "We do not refer [with respect to aggravated battery] to Whitley's violent abuse of her body cavities.... Id.

The respondent respectfully submits, therefore, that the Supreme Court of Virginia clearly limited its construction of "aggravated battery" in the instant case as contemplated by this Court in both Gregg and Godfrey. The respondent points out further that the limiting construction given to "aggravated battery" in Smith v. Commonwealth, supra, by the Virginia Supreme Court not only is consistent with the plurality decision in Godfrey, but predates that decision by almost two years.[2]

---

[1] The respondent also notes that petitioner's attempt to distinguish between "torture" and "aggravated battery" is misplaced. As stated by the Georgia Supreme Court in Blake v. State, 239 Ga. 292, 236 S.E.2d 637 (1977), and cited by this Court in Godfrey, "Considering torture and aggravated battery on the one hand as substantially similar treatment...." 446 U.S. at 431.

[2] The respondent submits further that petitioner's citation of Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), as exemplifying that almost any murder could be characterized under the Virginia Supreme Court's definition as "involving more than 'the minimum necessary to accomplish an act of murder'" is interesting in light of the fact that the instant claim was also made in Turner's petition for a writ of certiorari which was denied on May 18, 1981. 451 U.S. 1011 (1981). In any event, even if the Virginia Supreme Court had erred in Turner, which the respondent does not concede and submits that both the state and federal decisions in that case show otherwise, that has nothing whatsoever to do with the instant case in which the Supreme Court of Virginia constitutionally limited its construction of "aggravated battery:" Vagueness challenges to statutes that do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand. United States v. Mazurie, 419 U.S. 544 (1974).

II. THE SUPREME COURT OF VIRGINIA DID NOT IMPERMISSIBLY SHIFT THE BURDEN OF PROVING THAT PETITIONER'S MOTIVE FOR COMMITTING MURDER WAS SOMETHING OTHER THAN ROBBERY TO PETITIONER AND THUS DID NOT REFUSE TO APPLY VIRGINIA LAW THAT THE COMMONWEALTH MUST DISPROVE BEYOND A REASONABLE DOUBT ALL REASONABLE HYPOTHESES OF INNOCENCE.

Petitioner further asserts that this Court should grant his petition for a writ of certiorari because the Supreme Court of Virginia allegedly refused to apply Virginia law that the prosecution must "disprove beyond a reasonable doubt all reasonable hypotheses of innocence inferable from the facts, thus impermissibly shifting the burden of proof to petitioner" in violation of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Patterson v. New York, 432 U.S. 197 (1977).[3]

In Mullaney this Court concluded that a Maine law violated due process because it "affirmatively shifted the burden of proof to the defendant" upon "the critical fact in dispute" -- the presence or absence of malice -- thus increasing "the likelihood of an erroneous murder conviction." 421 U.S. at 701. Then, in Patterson this Court went to some lengths to point out the limitations of Mullaney and held that the requirements of In Re Winship, 397 U.S. 358 (1970), were satisfied when the prosecution proved beyond a reasonable doubt "every fact necessary to constitute the crime with which [Patterson was] charged." 432 U.S. at 206.

As the basis for his claim that the Supreme Court of Virginia erroneously shifted the burden of proof to him, petitioner points to a single sentence in the Virginia Supreme Court's decision: "[T]he mere fact that the larceny did not occur until after [petitioner] had killed his victim does not prove that his

---

[3] Petitioner does not claim that the instructions of the trial court in any way impermissibly shifted the burden of proof to him, and a review of the trial cour's instructions concerning the burden of proof clearly shows that the burden was not so shifted. (App. 155-162).

decision to steal was an afterthought." 286 S.E.2d at 166. However, petitioner, emphasizing the word "prove", has again taken something out of context and given it an erroneous construction.

The Virginia Supreme Court's comment to which he points directly follows the Court's statement that:

> Criminal intent, a state of mind, may be, and often must be, shown by circumstantial evidence. [Citation omitted]. Whitley contends that, in light of the circumstances disclosed by his extra-judicial statements and the physical evidence, the jury should have found that the killing was the act of a 'sexual psychopath' and that the larceny was committed only as an afterthought.' Id.

Then, after making the statement which petitioner cites as evidence of impermissible burden shifting, the Court went on to say:

> And the jury logically could have concluded that both sex and robbery motivated his conduct. Moreover, Whitley's hypothesis ... is legally significant only if it is reasonably supported by the evidence viewed in the light most favorable to the Commonwealth. His theory ignores certain facts bearing upon the question of intent. Id.

The respondent submits, therefore, that it is clear that the word "prove" was not used by the Supreme Court of Virginia in the sense of "burden of proof." Rather, it was merely a denial of petitioner's claim that certain facts could only lead to one conclusion. Indeed, petitioner admits that his argument to which the Virginia Supreme Court's comment was directed was "that the evidence taken in the light most favorable to the prosecution 'lead[s] unmistakably to the conclusion that he killed the victim in a berserk passionate rage and stole her property as an afterthought.'" (Petition for a Writ of Certiorari at 21). And any common sense reading of petitioner's argument is that he was saying that the evidence "proved" that he killed Mrs. Parsons in a rage and not during the commission of a robbery. The Virginia Supreme Court, in rejecting this claim, was merely stating that the facts did not "lead unmistakably" to petitioner's conclusion: The Court merely used the word "prove" instead of petitioner's phrase, "lead[s] unmistakably."

Moreover, petitioner's instant argument appears to be based on his further mistaken belief that all he had to do was present an "hypothesis of innocence" and the jury and State appellate court were bound to accept his version. Petitioner overlooks the fact, however, that the jury does not have to accept his "hypothesis of innocence": "The fact finder need not believe the accused's explanation and may infer that he is trying to conceal his guilt." Black v. Commonwealth, 222 Va. 838, 842, 284 S.E.2d 608 (1981). And the Virginia Supreme Court, when reviewing petitioner's conviction on appeal, viewed the facts of his case in the light most favorable to the prosecution. Carter v. Commonwealth, 223 Va. ____, 290 S.E.2d 865 (1982). While this perhaps made petitioner's "burden of persuasion" more difficult on appeal,[4] it is a far cry from placing the "burden of proof" upon him to disprove that he murdered Mrs. Parsons during the commission of a robbery.

In any event, the respondent notes that the placing of the burden on the prosecution to rule out every reasonable hypothesis except that of guilt beyond a reasonable doubt is solely a matter of State law, not involving a federal constitutional right. See Holland v. United States, 348 U.S. 121 (1954); Jackson v. Virginia, 443 U.S. 307, 327 (1979). Here, petitioner asserted to the Virginia Supreme Court in his Petition for Rehearing at page 6 as follows:

> [T]he Court again has abdicated its function of assuring that the Commonwealth has disproven beyond a reasonable doubt every reasonable hypothesis of innocence, and has shifted to Mr. Whitley the burden of proving by some unspecified standard an alternative theory of the facts which is inconsistent with his guilt.

---

[4] When conflicting inferences flow from even undisputed evidence, principles of appellate procedure require the Supreme Court of Virginia to adopt those conclusions most favorable to the prosecution if fairly deducible from the proven facts. Dianna Mickels Pugh v. Commonwealth of Virginia, 223 Va. ____, 291 S.E.2d ____, Slip Opinion at 4 (June 18, 1982). A copy of the Slip Opinion of the Supreme Court of Virginia is attached hereto.

However, after considering this claim, the Virginia Supreme Court found it meritless. (Petition for a Writ of Certiorari, Appendix at 3a). And, in a federal habeas corpus case, it has been analogously held that Virginia's highest court's denial of a petition, in which a violation of Virginia law was claimed, was a determination that no such violation had occurred, thus precluding the petitioner from claiming in federal court that the State Supreme Court misapplied its own law. Delph v. Slayton, 343 F.Supp. 449, 455 (W.D. Va. 1972). Any question of whether the Virginia Supreme Court violated Virginia law is a matter of State law and is not cognizable under federal review. See also Gryger v. Burke, 334 U.S. 728 (1948).

Finally, the respondent submits arguendo that even if the Supreme Court of Virginia did not correctly apply the Virginia standard of proof to petitioner's case, which the respondent does not concede, such a failure would be, at most, harmless error because it is clear from the facts of this case that this Court cannot say that no rational trier of fact could have found proof of petitioner's guilt beyond a reasonable doubt. 443 U.S. at 324. Indeed, when a record of historical fact supports conflicting inferences, a federal court must presume that such conflicts were resolved in favor of the prosecution and "must defer to that resolution." Id. at 326.

CONCLUSION

For the reasons presented, the respondent respectfully contends that the issues raised in this case are neither important nor substantial and that this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

GERALD L. BALILES
Attorney General of Virginia

Richard B. Smith

RICHARD B. SMITH
Assistant Attorney General

PRESENT: All the Justices

DIANNA MICKELS PUGH

v. Record No. 810917

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE A. CHRISTIAN COMPTON
June 18, 1982

FROM THE CIRCUIT COURT OF THE CITY OF BUENA VISTA
Rudolph Bumgardner, III, Judge

Indicted for killing her three-year-old daughter, defendant Dianna Mickels Pugh was found guilty in a bench trial of murder of the second degree and sentenced to a term of 20 years' imprisonment. The principal issue on appeal is whether the evidence is sufficient to support a finding of malice.

On July 15, 1980, about 3:00 p.m., the victim, Mary Elizabeth Pugh, was brought by ambulance from her home in Buena Vista to a Lexington hospital. The child was dead on arrival. The cause of death was acute laryngotrachael obstruction by black pepper.

The autopsy showed she had sustained multiple abrasions and contusions "of varying ages" about her face, arms, chest, back, buttocks, and legs. Even though three years old, the child weighed merely 17 pounds and was two and one-half feet tall, having the stature of a two-year-old and the weight of an average nine-months-old infant. The child's torso "was skin and bones" with no subcutaneous fat. "It looked like the baby had been starved," testified a physician in attendance at the hospital.

According to the medical examiner's report, the child's trachea was completely occluded "by large quantities of black pepper" extending downward into both bronchial branches. The respiratory passages were also blocked by pepper. In addition, the stomach was "completely packed with large quantities of black pepper."

The record shows that the defendant, about 30 years of age with a seventh-grade education, lived separate from her husband under poor economic conditions in Buena Vista with four of her young children. During the early afternoon of the "extremely hot" day in question, defendant was at home with her mother and children when the victim "just kept fretting and crying." Defendant's mother noticed her daughter was very nervous and saw her smack the victim, observing bruises about the child's body. The mother left defendant's home about 12:30 p.m.

Shortly thereafter, the victim was still crying, "whining," and was attempting to drink from "the baby's bottle," contrary to defendant's instructions to her. According to a statement made by defendant to the police the day following the crime, the victim "got on my nerves and I just hit her." Defendant used her hands, "sometimes [her] fist" to strike the child.

Then defendant forcibly put pepper into the child's mouth, stating she "just poured it from the box in her mouth." When asked the reason for placing the pepper in the child's mouth, defendant stated to the investigator, "Well, people always told me to put soap or something like that in their mouth when they cuss . . . to keep her from doing it." Defendant told the police, "I didn't mean to kill her."

About 2:45 p.m., "a young boy" telephoned the Buena Vista police dispatcher and reported "his sister was asleep and they could not wake her up." The dispatcher, having difficulty understanding the caller, asked to talk to anyone else at the home. Then defendant came to the telephone and said, "This is Mrs. Pugh, my daughter is unconscious and I cannot wake her up." When asked whether the defendant was "frantic" during her request for help, the dispatcher testified the "request was as matter of fact as though she was telling me the time of day."

Shortly thereafter, defendant's nephew arrived at her home and found defendant giving the victim mouth-to-mouth resuscitation. Defendant was "very upset," was crying, and was saying, "Mary, please breathe." In a few minutes, the first-aid squad arrived. Efforts to revive the child were unsuccessful. The victim then was taken to the hospital and defendant remained at home.

Defendant contends on appeal the evidence was insufficient to show she was "motivated" by malice and thus the trial court erroneously convicted her of second-degree murder. Referring to the evidence, defendant notes that the day in question was "uncomfortably hot;" that the children were "fussy because of the heat;" that she was extremely upset; that she did not realize the quantity of pepper administered was a lethal dose; and that she used the pepper to make the child behave without the intent to cause death.

Defendant also argues that other evidence rebuts the existence of malice. She points to her efforts to revive the child, and says the attempt inadvertently packed pepper into the respiratory system rather than cleared the air passages so the child could breathe. She also notes the medical testimony by physicians who examined and treated her at Central State Hospital, where she was sent for a court-ordered examination. One physician said she was a very unhappy, depressed, and frustrated person living an impoverished existence who, in his opinion, lacked the "intent to do harm to the child." We do not agree with defendant's contentions.

When sufficiency of the evidence is attacked, the judgment of the trial court sitting without a jury is entitled to the same weight as a jury verdict, and will not be disturbed on appeal unless plainly wrong or without evidence to support it. Code § 8.01-680; Evans v. Commonwealth, 215 Va. 609, 613, 212 S.E.2d

268, 271 (1975). When, as here, conflicting inferences flow from the undisputed evidence, principles of appellate procedure require us to adopt those conclusions most favorable to the Commonwealth if fairly deducible from the proven facts.

In Virginia, every unlawful homicide is presumed to be murder of the second degree. When the Commonwealth proves an unlawful homicide and establishes the accused as the criminal agent, the presumption, which is no more than an inference, arises, and the defendant has the burden of going forward with some evidence to show circumstances of "justification, excuse, or alleviation." Hodge v. Commonwealth, 217 Va. 338, 341, 343, 228 S.E.2d 692, 694, 696 (1976).

Code § 18.2-32 distinguishes the degrees of murder but does not define it. Murder at common law is a homicide committed with malice, either express or implied. Biddle v. Commonwealth, 206 Va. 14, 20, 141 S.E.2d 710, 714 (1965). And whether a defendant acted with malice is generally a question to be decided by the trier of fact. Bryan v. Commonwealth, 131 Va. 709, 714, 109 S.E. 477, 478 (1921).

Express malice is evidenced when "one person kills another with a sedate, deliberate mind, and formed design." M'Whirt's Case, 44 Va. (3 Gratt.) 594, 604 (1846). Implied malice exists when any purposeful, cruel act is committed by one individual against another without any, or without great provocation; "in other words, if the punishment inflicted for a slight transgression is in its nature out of all reason and beyond all proportion to the offense offered, then the inference of law is that the perpetrator was actuated by malice." Davidson v. Commonwealth, 167 Va. 451, 455, 187 S.E. 437, 439 (1936). Generally, implied malice is equivalent to "constructive malice;" that is, "malice as such does not exist but the law regards the circumstances of the act as so harmful that the law punishes the act as though

malice did in fact exist." 1 Wharton's Criminal Law and Procedure § 245 at 529 (1957).

The circumstances of this case plainly show that the defendant committed a heinous, cruel act, with hardly any provocation. The deed was wholly unreasonable, and beyond all proportion to any ordinary response to the conduct of a recalcitrant three-year-old. The frail child, obviously suffering from malnutrition and weighing only 17 pounds, was beaten by defendant with her hands and fist. The child must have been in a weakened condition not only from lack of food but from past blows to her face, arms, chest, back, buttocks, and legs. If that was not enough, the accused, by force, poured so much pepper into the child's mouth that her windpipe and her bronchial tubes were fully blocked by the substance. Moreover, the child's stomach was "completely packed with large quantities" of the pepper. While other inferences may flow from this evidence, we hold the trial court's conclusion that implied malice was shown beyond a reasonable doubt was fairly deducible from the proven facts, and we will not disturb the finding that defendant is guilty of murder of the second degree. See generally Annot., 89 A.L.R.2d 396.

Defendant raises two other issues; neither has merit. She contends her uncounseled, post-crime statement to the police was involuntary. Before questioning defendant, the investigator fully advised her according to Miranda v. Arizona, 384 U.S. 436 (1966). The officer then conducted a balanced, compassionate interview, at the conclusion of which defendant acknowledged she had responded to the questions voluntarily. Having studied the entire statement in light of the conditions under which it was given, we think the trial judge properly admitted into evidence through testimony of the interrogator excerpts from defendant's interview.

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Defendant also argues the trial court erroneously admitted into evidence a hearsay statement made by her estranged husband in the presence of a physician at the Lexington hospital. After he determined the child's condition on the day in question, the physician went to a hospital room adjoining the emergency room and said to the parents, "'Your child is dead,'" stating the baby had died of asphyxiation. Immediately, the father "acted very shocked," turned to the defendant, and said, "'Oh, no, not again.'" This colloquy was admitted over defendant's objection through testimony of the physician, and properly so. The father's out-of-court declaration was admissible under the spontaneous, excited utterance exception to the hearsay rule. The statement was prompted by a startling event, announcement of the unexpected death of one's child. It was not the product of premeditation, reflection, or design, and was made under such circumstances as to preclude the presumption it was uttered as the result of deliberation. Goins v. Commonwealth, 218 Va. 285, 287, 237 S.E. 2d 136, 138 (1977).*

For these reasons, the judgment of conviction will be

Affirmed.

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*We likewise reject defendant's contention that the husband's extra-judicial statement should have been excluded as a privileged communication.